

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,274

MELVIN A. BROWN,

Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 21 1964

Nathan J. Paulson
CLERK



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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MELVIN A. BROWN)	
2516 Lyndale Lane)	
Billings, Montana)	
Plaintiff,)	
v.)	Civil Action No. 3352-62
STEWART L. UDALL, Secretary)	
of the Interior)	
Defendant.)	

DOCKET ENTRIES

Date	Proceedings
<u>1962</u>	Deposit for cost by
Oct. 26	Complaint, appearance, Appendix A; exhibit A thru J filed.
Oct. 26	Summons, copies (3) and copies (3) of Complaint issued: ser. 10-30-62, US Atty. ser. 10-29-62, Atty. Gen. ser. 10-31-62
Dec. 21	Answer of deft. to complaint; c/m 12-21-62. App. of Thomas L. McKevitt, filed.
Dec. 21	Calendared (N) AC/N
<u>1963</u>	
Apr. 20	Motion by deft. for summary judgment; P & A; statement, c/m 4-19-63 M.C. 4-20-63; filed.
Apr. 27	Stipulation of counsel extending time to file opposition to motion for summary judgment to 5/29/63, filed.
May 23	Called. Asst. Pretrial Examiner.
May 27	Stipulation extending time for plaintiff to reply to motion for summary judgment, (M/N) filed.
June 3	Cross-motion of plaintiff for summary judgment. Statement P&A's in support & in opposition to defendant's motion for summary judgment, c/m 6-3-63, MC 6-3-63, filed.
June 17	Defendants memorandum of P&A in opposition to plaintiff's cross-motion for summary judgment c/m 6-14-63, filed.
Sept. 17	Order denying plttf's cross-motion for summary judgment; granting deft's motion for summary judgment; and dismissing complaint. (N) Holtzoff, J.

Date

Proceedings

1963

Nov. 4	Transcript of proceedings, Sept. 13, 1963, Vol I, pp 2, (Rep: Nevitt) (Court's copy)	filed.
Nov. 6	Notice of appeal by plaintiff from order of 9-17-63, Copy to T. McKevitt. \$5.00 deposit by M. Brown;	filed.

[Filed October 26, 1962]

**COMPLAINT FOR REVIEW, FOR DECLARATORY
JUDGMENT, AND FOR OTHER RELIEF**

The plaintiff for his complaint represents as follows:

1. The plaintiff is a citizen of the United States and of the State of Montana, and is a resident of the State of Montana.

2. The defendant is the Secretary of the Interior of the United States and as such is charged with the administration of the laws relating to the public lands, including the Mineral Leasing Act of February 25, 1920 c. 85, 41 Stat. 437, as amended, 30 U.S.C. 181 et seq. The official residence of the defendant is the District of Columbia.

3. The matter in controversy, exclusive of interest and costs, exceeds \$10,000.00.

4. The jurisdiction of this Court is invoked under Title 11, Section 306 of the District of Columbia Code, upon the ground of diversity of citizenship, and upon the further ground that the construction and interpretation of a Federal statute and regulations are involved and required. Plaintiff seeks relief under the terms of Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. 1009, and under the terms of 28 U.S.C. 2201 and 2202 relating to Declaratory Judgments. The Court has jurisdiction also by virtue of its inherent power to grant injunctive relief in the premises.

5. This case is concerned with the unlawful, unreasonable and arbitrary action of the defendant in failing and refusing to issue to plaintiff

oil and gas leases covering the land in suit to which plaintiff, as the first qualified applicant, is entitled under the law and under the decisions, rulings and administrative practice of the Department of the Interior. This case is also concerned with the unlawful, unreasonable and arbitrary action of the defendant in issuing an amendatory regulation prescribing maximum acreage limitations on public lands of the United States which is contrary to and in violation of the statute it purports to implement and which constitutes an attempt by the defendant to make law rather than to administer the statute as enacted by Congress.

6. The land in suit embraces a total of 3145.63 acres in the State of Wyoming. At all times herein material the 3145.63 acres were public lands of the United States believed to contain oil and gas deposits and were not within any known geological structure of a producing oil or gas field. The land in suit is more particularly described in Appendix A annexed hereto and made a part of this complaint.

Under the Act of August 8, 1946, c. 916, Sec. 3, 60 Stat. 951, 30 U.S.C., 1958 ed. sec. 226, amendatory of Section 17 of the Mineral Leasing Act of February 25, 1920, as amended, the Secretary of the Interior is authorized to lease such oil and gas lands. The Act mandatorily requires that:

* * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding . * * *

Plaintiff was and is the person first making application for noncompetitive leases covering the 3145.63 acres in suit who is qualified to hold leases under the Act.

7. Section 27 of the Act of February 25, 1920, as amended by the Act of August 2, 1954, c. 650, 68 Stat. 648, 30 U.S.C., 1958 ed. sec. 184, provides in pertinent part:

* * * No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State, * * * (Emphasis added.)

Section 32 of the Act of February 25, 1920, c. 85, 41 Stat. 450, 30 U.S.C. 189, provides in pertinent part:

That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, * * *

Acting pursuant to Section 32 of the Mineral Leasing Act the Secretary on January 8, 1959, amended the then existing regulation 43 CFR 192.3 (Code of Federal Regulations, Vol. 43, Revised 1954) governing acreage limitations on leases to provide for the first time notice to the public that the 46,080 acre limitation on oil and gas leases that may be held in any one State, prescribed in 30 U.S.C., 1958 ed. sec. 184, also includes applications or offers for leases. The amendment, herein referred to, is identified in the Department of the Interior as Circular 2009 and was published in Volume 24, Federal Register, at page 281. A copy of Circular 2009 is annexed hereto as Exhibit A and made a part of this complaint. For convenience, a copy of Circular 2002 dated May 20, 1958, which contains regulation 43 CFR 192.3 as it read for many years prior to its amendment on January 8, 1959, is annexed hereto as Exhibit B and made a part of this complaint.

Although Section 27 of the Act, quoted above, prescribes a maximum acreage limitation of 46,080 acres of oil and gas leases which may be held in one State, the amended regulation adopted as Circular 2009 purports, contrary to and in violation of Section 27 of the Act, to establish a maximum acreage limitation of 46,080 acres covering both leases and applications for leases. Thus, 43 CFR 192.3(a) now provides, improperly and erroneously, in pertinent part:

No person, association, or corporation, except as in the act provided, may hold more than 46,080 acres in any one State, or more than 100,000 acres in Alaska, whether directly through the ownership of leases or interests in leases and applications, or offers therefor or indirectly as a member of an association or associations, or as a stockholder of a corporation or corporations, holding leases or interests therein and applications or offers therefor. * * * (Emphasis added.)

43 CFR 192.3(e)(1) properly and correctly provides that:

If any person holding or controlling only leases or interests in leases is found to hold accountable acreage in violation of the provisions of this section and of the act, the last lease or leases or interest or interests acquired by him which created the excess acreage holding shall be cancelled or forfeited in their entirety, even though only part of the acreage in the lease or interest constitutes excess holding, unless it can be shown to the satisfaction of the Director of the Bureau of Land Management that the holding or control of the excess acreage is not the result of negligence or willful intent in which event the lease or leases shall be cancelled only to the extent of the excess acreage.

In contrast, 43 CFR 192.3(e)(2) improperly and erroneously provides that:

If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety.

Evidencing the arbitrary and unreasonable posture of subsection 192.3(e)(2)

as contrasted with subsection 192.3(e)(1), quoted above, the latter properly calls for forfeiture of the excess acreage in the last lease causing the holding in excess of 46,080 acres if no negligence or willful intent is present whereas the former improperly calls for rejection in their entirety of the entire group of applications or offers filed simultaneously that causes the holding in excess of 46,080 acres irrespective of whether or not negligence or willful intent is present. This is discriminatory and unreasonable and goes far beyond the Secretary's power under Section 32 of the Act (30 U.S.C. 189) to prescribe necessary and proper rules and regulations.

8. Prior to May 23, 1960, which is the critical date in this proceeding, plaintiff held in the State of Wyoming public domain oil and gas leases totalling 9,551.57 acres, well below the maximum of 46,080 acres authorized by 30 U.S.C., 1958 ed. sec. 184. Prior also to May 23, 1960, plaintiff had pending in the local land office of the Secretary's Bureau of Land Management in Cheyenne, Wyoming, five applications to lease a total of 3,720 acres as to which no final action either rejecting the applications or granting leases thereon had yet been taken as of that date. A summary of the leases held by the plaintiff and pending applications in the State of Wyoming immediately prior to May 23, 1960, is contained in Exhibit B-1 and made a part of this complaint.

Under the terms of the applicable statute, 30 U.S.C., 1958 ed. sec. 226 (Paragraph 6, *supra*), it is prescribed that only the person first making application who is qualified to hold a lease shall be entitled to a lease without competitive bidding. Prior to May 23, 1960, it had been determined by the Secretary's Bureau of Land Management that the plaintiff was not the person first making application for leases as to 3,040 acres of the 3,720 acres then in pending applications and, subsequently, leases for said 3,040 acres were issued to persons other than plaintiff -- as to the remaining 680 acres plaintiff was the person first making application for leases and, subsequently, leases were issued to him for 669.81 acres.

Yet, despite the foregoing and contrary to and in violation of both Sections 27 and 17 of the Mineral Leasing Act (30 U.S.C., 1958 ed. secs. 184, 226) the defendant Secretary of the Interior insists that plaintiff is chargeable as of May 23, 1960, with the full 3,720 acres included in the five applications then pending even though no leases had been issued to plaintiff for any of such lands as of that date.

9. On May 23, 1960, plaintiff filed in the Cheyenne land office of the Bureau of Land Management 30 applications for oil and gas leases covering a total of 35,614.10 acres of public lands in the State of Wyoming. These applications were found by the Cheyenne land office to be simultaneous with applications filed by others for the same lands which, under the applicable regulation 43 CFR 191.10, requires that a public drawing be held to determine priority of filing as among the simultaneous applications. This regulation is identified in the Department of the Interior as Circular 2032 and was published in Volume 24, Federal Register, at page 9846. It is annexed hereto as Exhibit C and made a part of this complaint. 43 CFR 191.10(a) provides that:

Where applications or offers received by mail or filed over the counter at the same time are in conflict the right of priority of filing will be determined by public drawing in the manner provided in Sec. 295.8(b) of this chapter.

Plaintiff filed said 30 applications covering a total of 35,614.10 acres knowing that as of May 23, 1960, he was charged with a total of 9,551.57 acres held by him under outstanding leases in accordance with the terms of 30 U.S.C. 184 (Paragraph 7, supra). He recognized the possibility that as of May 23, 1960, the Secretary's Bureau of Land Management would, on the basis of invalid and unauthorized regulation 43 CFR 192.3(a), consider him chargeable under 30 U.S.C. 184 with 669.81 acres in pending applications as to which he had priority of filing. Plaintiff did not know that as of May 23, 1960, the Secretary's Bureau of Land Management would, by virtue of invalid and unauthorized regulation 43 CFR 192.3(a), consider him chargeable under 30 U.S.C. 184 with 3,050.19

acres in pending applications as to which it had been determined prior to May 23, 1960, following a drawing held pursuant to regulation 43 CFR 191.10(a), that he had no priority of filing. By virtue of the same invalid and unauthorized regulation the Bureau of Land Management also charged plaintiff under 30 U.S.C. 184 with 35,614 acres of public lands which were included in the 30 applications for leases filed on May 23, 1960, although no drawing had yet been held nor priority of filing determined as among the simultaneous applications filed for the same 35,614 acres.

10. On June 7, 1960, a public drawing was held in the Cheyenne land office to determine priority of filing as among the simultaneous applications filed for the 35,614.10 acres of public domain lands that were also included in plaintiff's 30 applications. Prior to such drawing plaintiff's applications had no priority of filing and plaintiff was not the first qualified applicant entitled to leases without competitive bidding as perscribed in 30 U.S.C. 226 (Paragraph 6, supra). When the drawing of June 7, 1960, was concluded it was determined by the Cheyenne land office that of the 35,614.10 acres applied for plaintiff had acquired priority as to a total of 5,065.63 acres including the land in suit. In the same drawing it was determined that plaintiff had not acquired priority as to the balance of the lands applied for on May 23, 1960, totalling 30,548.47 acres. As to the land in suit for which plaintiff acquired priority in the June 7, 1960, public drawing, the plaintiff is the first qualified applicant entitled to leases pursuant to 30 U.S.C. 226.

11. Summarizing, as of May 23, 1960, plaintiff was properly chargeable with a total of 9,551.57 acres held by him under oil and gas leases in the State of Wyoming in accordance with the applicable statute 30 U.S.C., 1958 ed. sec. 184, which provides that "No person * * * shall take or hold at one time oil or gas leases exceeding in the aggregate forth-six thousand and eighty acres granted hereunder in any one State" * * * (Paragraph 7, supra). The Mineral Leasing Act of February 25, 1920, as amended, does not prescribe any acreage limitation on applications for oil and gas leases. Nevertheless, as hereinafter shown,

the Bureau of Land Management in violation of and contrary to 30 U.S.C. 184 held that plaintiff was also chargeable as of May 23, 1960, with 3720 acres in five pending applications filed prior to that date (see Paragraph 8, supra) and with 35,614.10 acres in 30 applications filed on that date (see Paragraph 9, supra) even though plaintiff had no priority and was not the first qualified applicant as to all the acreage in the pending applications except for a total of 669.81 acres. Adding the acreage held by plaintiff under leases (9,551.57) with the acreage in pending applications (39,334.10 acres) the Bureau held that as of May 23, 1960, plaintiff's leases and applications exceeded 46,080 acres in the State of Wyoming in violation of law.

12. In a letter dated July 20, 1960, the Cheyenne land office advised plaintiff in pertinent part:

Our records have you charged with a total of 48,919.55 acres as of 5/23/60 of oil and gas interests in the State of Wyoming. If these records are correct, it will necessitate the following action:

Rejection of the oil and gas offer(s) filed as simultaneous offers on May 23, 1960.

* * *

Unless you can show a material error in our totals within the next 15 days, we will have to proceed with the rejection or cancellation action indicated.

A copy of this letter is annexed hereto as Exhibit D and made a part of this complaint.

In reply plaintiff submitted a list of his leases and pending applications in the State of Wyoming and advised the Cheyenne land office by letter of July 26, 1960, in pertinent part:

Pursuant to our telephone conversation of the 22nd I am herewith enclosing a list of my Wyoming Federal Oil and Gas Leases and Applications. According to my figures these acres total 45,377.36 acres which amount is under the ceiling as specified in the Oil and Gas Leasing Regulations.

As you can imagine, under the new Simultaneous Filing System it is extremely difficult for the public and myself specifically to keep an accurate schedule of chargeable acreage because many times the results of the previous months drawings and rejections are not received before the new Simultaneous Filing Period begins. Checks were cashed without apparent reason. It has been most confusing.

A copy of this letter is annexed hereto as Exhibit E and made a part of this complaint.

13. By decision of August 15, 1960, the Cheyenne land office rejected in their entirety the applications covering the land in suit as to which plaintiff had acquired priority of filing in the drawing of June 7, 1960. The reasons for this action were stated as follows:

The oil and gas lease offers listed below, along with other offers previously rejected, caused your chargeable acreage of interests in oil and gas leases, or offers to lease, to exceed 46,080 acres of Public Domain land in the State of Wyoming. Therefore, pursuant to the provisions of 43 CFR 192.3(e)(2), the following offers to lease are REJECTED in entirety:

Wyoming 0105504
0105574
0109031

Wyoming 0110925
0111198

The statement of holdings which you furnished does not show to the satisfaction of this office that the above-listed offers did not cause your chargeable acreage of interests in oil and gas leases or offers to lease to exceed the legal limitations.

This decision becomes final 30 days from its receipt unless you appeal it to the Director, Bureau of Land Management. If an appeal is taken, there must be strict compliance with the procedures contained in attached Form 4-1364.

A copy of this decision is annexed hereto as Exhibit F and made a part of this complaint. Thus, the Cheyenne land office did not reject the

applications or offers therein listed because plaintiff held oil and gas leases in the State of Wyoming in excess of the maximum amount (46,080) authorized by the statute but rather because "The oil and gas lease offers listed below, along with other offers previously rejected, caused your chargeable acreage of interests in oil and gas leases, or offers to lease, to exceed 46,080 acres of Public Domain land in the State of Wyoming." This is contrary to and in violation of the statute (Paragraph 7, *supra*).

14. A timely appeal from the decision of the Cheyenne land office was taken by plaintiff to the Director of the Bureau of Land Management in accordance with the Secretary's Rules of Practice 43 CFR 221.2. By decision of March 14, 1961, the Director's office affirmed the Cheyenne land office stating in part:

As to the appellant's main contention in this appeal, the law (30 U.S.C., 1958 ed. sec. 184) provides for the taking or holding or control under the acreage limitation provisions of the Act. In consonance with the law Departmental regulation 43 CFR 192.3(e)(2) provides:

If any person holding or controlling leases or interest in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety.

(Emphasis supplied) [Emphasis is Bureau's, not mine.]

Thus, the Bureau of Land Management erroneously and improperly upheld the rejection of plaintiff's applications covering the land in suit on the basis of an invalid and unauthorized regulation 43 CFR 192.3(e)(2) alleged to stem from the statute 30 U.S.C. 184. By underscoring the word "controlling" the Bureau itself acknowledged that control over acreage is

an essential ingredient in the chargeability of acreage under the terms of the statute but ignores completely the fact that as of the critical date May 23, 1960, the plaintiff did not hold leases in excess of 46,080 acres and therefore did not and could not exercise control over the acreage in pending applications which were charged against plaintiff. A copy of the Bureau's decision of March 14, 1961, is annexed hereto as Exhibit G and made a part of this complaint.

15. Thereafter, plaintiff filed a timely appeal from the decision of the Bureau of Land Management to the defendant Secretary of the Interior in accordance with the Department's Rules of Practice 43 CFR 221.32. By decision of August 31, 1962, the Deputy Solicitor acting for the Secretary affirmed the Bureau of Land Management. A copy of the Deputy Solicitor's decision is annexed hereto as Exhibit H and made a part of this complaint.

The Deputy Solicitor's decision ignores completely the plain and unequivocal language of the statute prescribing a maximum acreage limitation of 46,080 acres of leases that may be held in one State but attempts to justify the Secretary's power to issue the regulation 43 CFR 192.3(a), here complained of, by virtue of Section 32 of the Act (Paragraph 7, *supra*) which authorizes the Secretary to prescribe necessary and proper rules and regulations to carry out and accomplish the purposes of the Act. That the regulation is inconsistent with and in violation of the statute, that it is in excess of the Secretary's power and that it usurps the legislative function and is an attempt to make law, are brushed aside arbitrarily and capriciously. The decision also ignores completely plaintiff's contention in the administrative proceeding that the regulation 43 CFR 192.3(e)(2) here complained of is ambiguous and unclear in failing to spell out with particularity that after drawings are held and priority among simultaneous applications are established the unsuccessful applicants continue nevertheless to be charged with the acreage included in their unsuccessful applications under the acreage limitation provision of the statute. This violates the well established principle of the Secretary's Department of the Interior reaffirmed in the case of Donald C.

Ingersoll, Vol 63, Interior Decisions, at pp. 397, 400, that:

* * * when an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be spelled out so clearly that there is no basis for disregarding his noncompliance. * * *

In a letter dated September 5, 1962, to the Deputy Solicitor plaintiff's attorney called attention to the fact that not a single word in the decision is addressed to this well-settled principle although it was one of the main arguments stressed in the administrative proceeding. In the Deputy Solicitor's reply of September 14, 1962, this too is brushed aside arbitrarily and capriciously. Copies of the exchange of letters of September 5, 1962, and September 14, 1962, are annexed hereto as Exhibits I and J and made a part of this complaint.

16. Under the Rules of Practice of the Department of the Interior, 43 CFR Part 221, the plaintiff has exhausted the administrative remedy.

17. The action of the defendant is rejecting plaintiff's applications Wyoming 0105504, 0105574, 0110925 and 0111198 covering the land in suit and in refusing to issue noncompetitive oil and gas leases to plaintiff as the first qualified applicant is unlawful, arbitrary, unreasonable and capricious, is in violation of Sections 17 and 27 of the Mineral Leasing Act of February 25, 1920, as amended, and is contrary to the decisions, rulings and established administrative practice of the Department of the Interior.

WHEREFORE Plaintiff prays:

1. That the Court review the action of the defendant in accordance with the provisions of Section 10 of the Administrative Procedure Act (5 U.S.C. 1009).

2. That it be declared and adjudged that Section 27 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed. sec. 184), prescribing a maximum acreage limitation of 46,080 acres of oil or gas leases which may be held in one State does not include applications or offers to lease for oil or gas.

3. That it be declared and adjudged that defendant violated Section 27 of the Act, supra, in promulgating and issuing on January 8, 1959, Circular 2009 containing amendments of regulation 43 CFR 192.3, purporting to establish a maximum acreage limitation of 46,080 acres of leases and applications or offers to lease.

4. That it be declared and adjudged that defendant's Circular 2009 containing amendments of regulations 43 CFR 192.3 is null and void as of its inception.

5. That it be declared and adjudged that defendant violated Section 17 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C., 1958 ed. sec. 226), in rejecting plaintiff's oil and gas applications or offers Wyoming 0105504, 0105574, 0110925 and 0111198.

6. That the defendant be directed to reinstate plaintiff's oil and gas applications or offers Wyoming 0105504, 0105574, 0110925 and 0111198 and to issue noncompetitive oil and gas leases to plaintiff as the first qualified applicant if his lease offers are otherwise regular and complete.

7. That defendant pay to plaintiff the costs of this action.

8. That plaintiff have such other and further relief as is just and equitable.

/s/ Max Barash

* * *

Attorney for Plaintiff

DISTRICT OF COLUMBIA: ss

Max Barash, being first duly sworn, deposes and says that he is the attorney for the plaintiff herein, that the plaintiff is a resident of Billings, Montana, and is absent from the District of Columbia, that affiant read the foregoing complaint by him subscribed and that he knows the contents thereof and that the matters and things therein stated he verily believes to be true.

/s/ Max Barash

[JURAT: Dated October 25, 1962]

[Filed October 26, 1962]

APPENDIX A

LEGAL DESCRIPTION OF LAND IN SUIT

<u>Serial Number</u>	<u>Lands Applied For</u>
Wyoming 0105504	<p>T. 36 N., R. 63 W., Niobrara County, Wyoming</p> <p>Sec. 6: Lots 1, 2, 4, 5, S-1/2NE-1/4</p> <p>Sec. 20: NW-1/4, S-1/2SW-1/4</p> <p>Sec. 30: E-1/2E-1/2</p> <p>Sec. 32: E-1/2NE-1/4, SE-1/4</p> <p>Sec. 33: W-1/2NW-1/4</p> <p>T. 36 N., R. 64 W.</p> <p>Sec. 13: SW-1/4NW-1/4</p> <p>Total area 1002.02 acres</p>
Wyoming 0105574	<p>T. 39 N., R. 65 W., Niobrara County, Wyoming</p> <p>Sec. 3: Se-1/4</p> <p>Sec. 7: W-1/2SE-1/4</p> <p>Sec. 21: W-1/2SE-1/4</p> <p>Sec. 35: SE-1/4</p> <p>Sec. 15: E-1/2NE-1/4</p> <p>Total area 560 acres</p>
Wyoming 0110925	<p>T. 14 N., R. 110 W., Sweetwater County, Wyoming</p> <p>Sec. 28: SW-1/4, SW-1/4SE-1/4</p> <p>Sec. 32: SW-1/4</p> <p>Sec. 33: E-1/2E-1/2, E-1/2NW-1/4, NW-1/4NW-1/4, S-1/2SW-1/4</p> <p>Total area 720 acres</p>
Wyoming 0111198	<p>T. 28 N., R. 112 W., Sublette County, Wyoming</p> <p>Sec. 10: SE-1/4, SW-1/4NE-1/4</p> <p>Sec. 11: N-1/2S-1/2, Se-1/4SE-1/4, E-1/2NW-1/4, NE-1/4</p> <p>Sec. 12: W-1/2NW-1/4, NW-1/4SW-1/4, Lots 4, 5, 11, 12</p> <p>Total area 863.61 acres</p>

EXHIBIT A

Title 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

[Circular 2009]

PART 192—OIL AND GAS LEASING

Miscellaneous Amendments

1. Paragraphs (a) and (c) of § 192.3 are amended to read as follows, and new paragraphs (d) and (e) are added thereto:

§ 192.3 Acreage limitations.

(a) No person, association, or corporation, except as in the act provided, may hold more than 48,080 acres in any one State, or more than 100,000 acres in Alaska, whether directly through the ownership of leases or interests in leases and applications, or offers therefor or indirectly as a member of an association or associations, or as a stockholder of a corporation or corporations, holding leases or interests therein and applications or offers therefor. Leases or offers or applications for leases committed to any unit or cooperative plan approved or prescribed by the Secretary of the Interior shall not be included in computing accountable acreage. Leases or offers or applications for leases subject to an operating, drilling, or development contract approved by the Secretary of the Interior pursuant to section 17(b) of the act, other than communitization agreements, shall be excepted in determining the accountable acreage of the lessees or operators. Where, as the result of the termination or contraction of a unit or cooperative plan, or the elimination of a lease from an operating, drilling, or development plan, a party holds or controls excess accountable acreage, such party shall have 30 days from such termination or contraction or elimination in which to reduce his holdings to the prescribed limitation and to file proof of such reduction in the proper land office.

(c) No lease will be issued and no transfer or operating agreement will be approved until it has been shown that the offeror, transferee, or operator is entitled to hold the acreage or obtain the operating rights.

(d) At any time upon request by the authorized officer of the Bureau of Land Management, the record title holder of any lease or a lease operator or a lease offeror may be required to file in the appropriate land office a statement, showing as of a specified date the serial number and the date of each lease of

which he is the record holder, or under which he holds operating rights, and each application or offer for lease held or filed by him in the particular State setting forth the acreage covered thereby, and the nature, extent and acreage interest, including royalty interests held by him in any oil and gas lease of which the reporting party is not the lessee of record, whether by corporate stock ownership, interest in unincorporated associations and partnerships, or in any other manner.

(e) (1) If any person holding or controlling only leases or interests in leases is found to hold accountable acreage in violation of the provisions of this section and of the act, the last lease or leases or interest or interests acquired by him which created the excess acreage holding shall be cancelled or forfeited in their entirety, even though only part of the acreage in the lease or interest constitutes excess holding, unless it can be shown to the satisfaction of the Director of the Bureau of Land Management that the holding or control of the excess acreage is not the result of negligence or willful intent, in which event the lease or leases shall be cancelled only to the extent of the excess acreage.

(2) If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety.

(3) If any person holding or controlling both leases or interests in leases and applications or offers for leases, or only applications or offers for leases below the acreage limitation provided in this section, acquires a lease or leases, or interests therein, which cause him to exceed the acreage limitation, his most recently filed application or offer, or applications or offers, then containing acreage in excess of the limitation provided in this section will be rejected in its or

their entirety. For the purpose of this subparagraph, time of filing shall be determined by the time of filing marked on the application or offer or, if the same time is marked on two or more applications or offers, by the serial number of the applications or offers.

(4) The provisions of this paragraph shall not limit any action which the Department may take with respect to excess acreage holdings in cases not otherwise covered by this paragraph.

§ 192.4 [Amendment]

2. Paragraphs (a) and (c) of § 192.4 are amended to read as follows:

(a) Acreage held under a nonrenewable option, valid only for three years or such longer period as may be authorized by the Secretary, shall not be chargeable under § 192.3, but no optionee may hold options on leases or offers to lease at any one time for more than 200,000 acres in any one State.

(c) Each optionee must file in the appropriate land office within 90 days after June 30 and December 31 of each year duplicate statements under oath, showing as of the prior June 30 and December 31, respectively (1) name of optioner and serial number of lease, application or offer for lease subject to option; (2) date and expiration date of each option; (3) number of acres covered by each option, and (4) aggregate number of options held in each State, and total acreage thereof. Options statements covering lands in the State of California shall be filed in the land office at Sacramento, California, and statements covering lands in Alaska shall be filed in the land office at Anchorage, Alaska.

§ 192.42 [Amendment]

3. Subparagraph (3) of paragraph (c) of § 192.42 is amended and subdivided to read as follows:

(e) Each offer, when first filed, shall be accompanied by:

Published in 24 F.R. January 13, 1959

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(3) (i) Except in a case where an officer of a corporation signs an offer on behalf of the corporation (as to which see paragraph (f) of this section), evidence of the authority of the attorney in fact or agent to sign the offer and lease, if the offer is signed by such attorney or agent on behalf of the offeror.

(ii) If such offeror is an individual, a statement over the offeror's signature setting forth the offeror's citizenship and whether the offeror's direct and indirect interests in oil and gas leases, applications, and offers therefor, exceed 48,080 chargeable acres in the same State, or exceed 100,000 acres in Alaska.

(iii) A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names and the nature and extent of the interest therein of the other interested parties, the nature of the agreement between them, if oral, and a copy of such agreement, if written. Such statement must be signed by all of the interested parties including the offeror, and all interested parties must furnish evidence of their qualifications to hold such lease interests. Such statement must be filed not later than 15 days after the filing of the lease offer.

(Sec. 32, 41 Stat. 450; 30 U.S.C. 189)

FRED A. SEATON,
Secretary of the Interior.

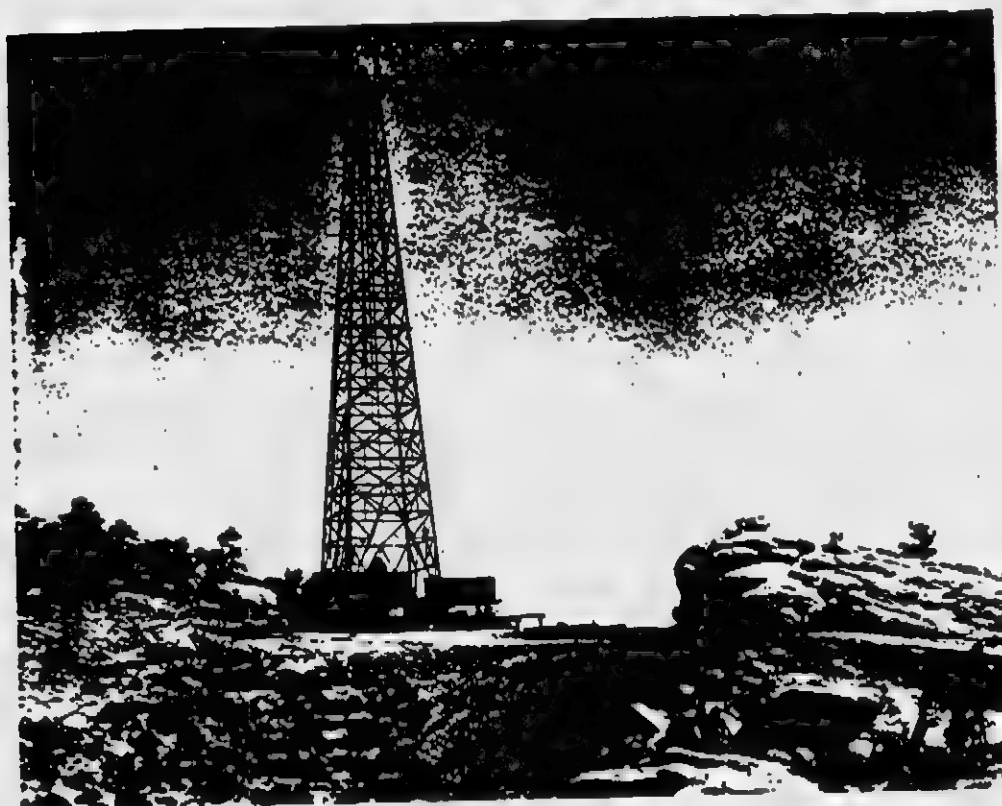
JANUARY 8, 1959.

[F.R. Doc. 59-334; Filed, Jan. 9, 1959;
4:24 p.m.]

Circular 2002

REGULATIONS
FOR
OIL AND GAS LEASING
- ON -
FEDERAL PUBLIC LANDS

==
PART 192, TITLE 43,
Code of Federal Regulations



DEPARTMENT
OF THE INTERIOR



BUREAU OF
LAND MANAGEMENT

MAY 20, 1958

TITLE 43--PUBLIC LANDS INTERIOR

Chapter 1--Bureau of Land Management, Department of the Interior

Circular 2002

PART 192--OIL AND GAS LEASES

GENERAL PROVISIONS

- Sec.**
 192.1 Applicability of amendatory act to existing leases.
 192.2 Helium.
 192.3 Acreage limitations on leases.
 192.4 Acreage limitations on options.
 192.5 Lands within one mile of naval petroleum or helium reserves.
 192.6 Boundaries of known geologic structures and productive limits of producing oil or gas fields and deposits.
 192.7 Agreements to compensate for drainage.
 192.8 Protection of leased lands from drainage.
 192.9 LEASING OF WILDLIFE REFUGE LANDS, GAME RANGE LANDS AND COORDINATION LANDS COOPERATIVE CONSERVATION PROVISIONS
 192.20 Cooperative or unit plans.
 192.21 Application for approval of plan.
 192.22 Communitization or drilling agreements.
 192.23 Approval of operating, drilling, or development contracts without regard to acreage limitations.
 192.24 Combinations for joint operation of refinery, or for transportation of oil.
 192.25 Subsurface storage of oil or gas.
 192.40 Classes and term.
 192.40a Dating of competitive and noncompetitive oil and gas leases.
 192.41 Leases for lands wholly or partly within unit areas.
 192.42 Offer to lease, and issuance of lease.
 192.43 Availability of lands to further lease offers where noncompetitive lease is cancelled, relinquished or terminated.
 192.44 Pending applications.
 192.50 Designation and offer of lands for lease by competitive bidding.
 192.51 Notice of lease offer.
 192.52 Qualifications of successful bidder.
 192.53 Award of lease.
 192.54 Form of lease.
 192.60 Application to exchange lease for a new lease.
 192.61 Application for renewal.
 192.62 Action on application.
 192.63 Form of lease.
 192.70 Preference right of patentee or entryman to a lease.

- Sec.**
 192.71 Lands in entries or claims not impressed with a reservation of oil and gas.
 192.72 Showing required of oil and gas offerings for unsurveyed lands.
 192.80 Rentals.
 192.81 Minimum royalty.
 192.82 Royalty on production.
 192.83 Limitation of overriding royalties.

BONDS

- 192.100 Amount of bonds required of lessee.
 192.101 Form of bonds.

CONTINUATION OR EXTENSION OF LEASE

- 192.120 Single extension of a noncompetitive lease; segregation of leased lands; notation of records.
 192.121 Continuation of lease on termination of production.
 192.122 Extension for terms of cooperative or unit plan.
 192.123 Extension of lease eliminated from cooperative or unit plan or communitization or drilling agreement and of lease in effect at termination of such plan or agreement.

ASSIGNMENTS OR TRANSFERS

- 192.140 Assignments or transfers of leases or interests therein.
 192.141 Requirements for filing of transfers.
 192.142 Separate assignments required for transfer of record titles to leases.
 192.143 Effect of assignment of particular tract.
 192.144 Extension of leases segregated by assignment.
 192.145 Royalty interests in oil and gas leases and assignments thereof.

TERMINATION OF LEASES

- 192.160 Relinquishments of leases or portions thereof.
 192.161 Cancellation and termination of lease.

AUTHORITY: §§ 192.1 to 192.161 issued under sec. 32, 41 Stat. 480; 30 U. S. C. 180.

SOURCE: §§ 192.1 to 192.161 appear at 19 F. R. 9011, Dec. 23, 1954, except as otherwise noted.

GENERAL PROVISIONS

§ 192.1 *Applicability of amendatory act to existing leases.* Prior to the filing of the notice of election hereinafter referred to, the act of August 8, 1946 (60 Stat. 950; 30 U. S. C. 181) applies to leases issued prior to the date of that

act only where the amendatory act so provides. The owner of any lease issued prior to August 8, 1946, may elect pursuant to section 15 to come entirely under the provisions of that act by filing a notice of election to have his lease governed by the amendatory act, accompanied by the consent of the surety if there is a bond covering the lease. A notice of election so filed shall constitute an amendment of all provisions of the lease to conform with the provisions of the amendatory act and the regulations issued hereunder.

§ 192.2 *Helium.* The ownership of and the right to extract helium from all gas produced from lands leased or otherwise disposed of under the act have been reserved to the United States. Appropriate provision is made in leases with respect to the recovery of helium.

§ 192.3 *Acreage limitations on leases.* (a) No person, association, or corporation, except as in the act provided, may hold more than 46,080 acres in any one State, or more than 100,000 acres in the Territory of Alaska, whether directly through the ownership of leases or interests in leases, or indirectly as a member of an association or associations, or as a stockholder of a corporation, or corporations, holding leases or interests therein or both. All leases committed to any unit or cooperative plan approved or prescribed by the Secretary of the Interior shall not be included in computing accountable acreage under section 27 of the act. All leases operated under an operating, drilling, or development contract approved by the Secretary of the Interior pursuant to section 17 (b) of the act, and interests thereunder, other than communitization agreements, and all leases issued under sections 18 and 19 of the act shall be excepted in determining the lessees' and the operators' acreage holdings or control under the provisions of any section of this act.

(b) In computing acreage holdings or control, the accountable acreage of a party owning an undivided interest in a lease shall be such party's proportionate part of the total lease acreage. Likewise, the accountable acreage of a party owning an interest in a corporation or association shall be his proportionate part

REPRINT May 14, 1958
 Part 192, 43 CFR

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of the corporation's or association's accountable acreage. Parties owning a royalty or other interest determined by or payable out of a percentage of production from a lease will be charged with a similar percentage of the total lease acreage.

(c) No lease will be issued and no transfer will be approved until it has been shown pursuant to the requirements of § 192.42 (e) (4) that the lessee or transferee is entitled to hold the acreage. Any party found to hold or control accountable acreage computed in accordance with the principles above set forth in excess of the prescribed limitations shall be given thirty days within which to file proof of the reduction of his holdings or control so as to conform with the prescribed limitation.

§ 192.4 *Acreage limitations on options.* (a) Acreage held under a nonrenewable option, valid only for three years or such longer period as may be authorized by the Secretary, shall not be chargeable under § 192.3, but no optionee may hold options at any one time for more than 200,000 acres in any one State, or in the Territory of Alaska.

(b) No such option shall be taken for more than three years without the prior approval of the Secretary of the Interior, except that an option hereafter taken on a lease application or offer may be for the period of time until issuance of the lease and three years thereafter. Where it is sought to obtain options for periods in excess of those provided in the preceding sentence, an application should be filed with the Director, Bureau of Land Management, accompanied by a complete showing as to the special or unusual circumstances which are believed to justify approval of the application by the Secretary.

(c) Within the meaning of this section, options may be taken only on lands embraced in leases and offers or applications for leases and the acreage included in any such option taken upon an application or offer for a lease shall be chargeable from and after the date of such option.

(d) It shall be permissible for any such option to provide that where all or any part of the land covered thereby is included in a cooperative or unit plan (as defined in § 192.20) duly executed by the parties and submitted to the Secretary for final approval prior to the expiration of the three-year option period, then, as to that part of the land covered by said option which is included in said cooperative or unit plan, such option shall not expire until a date 30 days after the date of final approval or disapproval by the Secretary of that cooperative or unit plan.

(e) Each optionee must file with the Director, Bureau of Land Management, within 90 days after December 31 and

June 30 of each year, a statement showing as of the prior December 31 and June 30, respectively, (1) name of optioner and serial number of lease, application or offer for lease subject to the option (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage thereof.

(f) If the statement shows or it is otherwise ascertained that the optionee holds options in excess of the prescribed limitation, he will be given 30 days within which to file proof of reduction of his option holdings to the limitations prescribed by the act.

§ 192.5 *Lands within one mile of naval petroleum or helium reserves.* No oil and gas lease will be issued for land within one mile of the exterior boundaries of a naval petroleum or a helium reserve, unless the land is being drained of its oil or gas deposits or helium content by wells on privately owned land or unless it is determined by the authorized officer, after consultation with the agency exercising jurisdiction over the reserve, that operations under such a lease will not adversely affect the reserve through drainage from known productive horizons.

§ 192.6 *Boundaries of known geologic structures and productive limits of producing oil or gas fields and deposits.* The Director of the Geological Survey will determine the boundaries of the known geologic structures of producing oil or gas fields and, where necessary to effectuate the purposes of the act, the productive limits of producing oil or gas deposits as such limits existed on August 8, 1946. Maps or diagrams showing the boundaries of known geologic structures of producing oil or gas fields and of the productive limits of producing oil or gas deposits will be placed on file in the appropriate land office, and office of the oil and gas supervisor. Any lessee or his operator may apply to have a determination made as to whether or not the land upon which he intends to drill a well is inside or outside the productive limits of a producing oil or gas deposit. The application should be accompanied by all available geologic data which in his opinion have a bearing on the matter.

§ 192.7 *Agreements to compensate for drainage.* Upon a determination by the Director of the Geological Survey that lands owned by the United States are being drained of oil or gas by wells drilled on adjacent lands, the authorized officer of the Bureau of Land Management, may execute agreements with the owners of adjacent lands whereby the United States, or the United States and its lessees, shall be compensated for such drainage, such agreements to be made with the consent of any lessee affected thereby. The precise nature of any

agreement will depend on the conditions and circumstances involved in the particular case.

§ 192.8 *Protection of leased lands from drainage.* (a) Where land in any lease is being drained of its oil or gas content by a well either on a Federal lease issued at a lower rate of royalty or on land not the property of the United States, the lessee must drill and produce all wells necessary to protect the leased lands from drainage. In lieu of drilling such wells, the lessee may, with the consent of the Director of the Geological Survey, pay compensatory royalty in the amount determined in accordance with 30 CFR 221.21.

(b) The payment of compensatory royalty under this section or § 192.7 shall extend the primary or extended term of any lease for the period during which such compensatory royalty is paid, and for a period of one year from the discontinuance of such payment, and for so long thereafter as oil or gas is produced in paying quantities.

§ 192.9 *Leasing of wildlife refuge lands, game range lands and coordination lands.* (a) *Definitions.*—(1) *Wildlife refuge lands.* Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the United States Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(2) *Game range lands.* Game ranges created by a withdrawal of public lands and reserved for dual purposes, namely protection and improvement of the public grazing lands and natural forage resources and conservation and development of natural wildlife resources, are under the joint jurisdiction of the Bureau of Land Management and the United States Fish and Wildlife Service.

(3) *Coordination lands.* These lands are withdrawn or acquired by the Government and made available to the States by cooperative agreements entered into between the United States Fish and Wildlife Service and the game commissions of the various States, in accordance with the act of March 10, 1934 (48 Stat. 401), as amended by the act of August 14, 1946 (60 Stat. 1080), or by long-term leases or agreements between the Department of Agriculture and the game commissions of the various States pursuant to the Bankhead-Jones Farm Tenant Act (50 Stat. 525), as amended, where such lands were subsequently transferred to the Department of the Interior, with the United States Fish and Wildlife Service as the custodial agency of the Government.

(4) *Alaska wildlife areas.* Such lands are areas in Alaska created by a with-

[Filed October 26, 1962]

EXHIBIT B-1SUMMARY OF PLAINTIFF'S LEASES AND PENDING APPLICATIONS
IN THE STATE OF WYOMING IMMEDIATELY PRIOR TO MAY 23, 1960LEASES

<u>SERIAL NUMBER</u>	<u>DATE LEASE ISSUED</u>	<u>ACREAGE</u>
W-098681	May 1, 1960	400.00
W-098616	May 1, 1960	396.45
W-091222	March 1, 1960	470.55
W-089866	January 1, 1960	438.68
W-088008	February 1, 1960	960.00
W-089658	February 1, 1960	80.00
W-093001	March 1, 1960	872.39
W-093022	February 1, 1960	320.00
W-093209	March 1, 1960	793.28
W-091640	March 1, 1960	1299.15
W-089729	December 1, 1959	80.00
W-089683	December 1, 1959	640.00
W-089681	December 1, 1959	80.00
W-088372	December 1, 1959	40.00
W-087867	December 1, 1959	80.00
W-086799	December 1, 1959	760.00
W-086764	December 1, 1959	242.84
W-086676	December 1, 1959	320.75
W-086613	December 1, 1959	157.48
W-085912	November 1, 1959	160.00
W-085752	November 1, 1959	640.00
W-084135	March 1, 1960	320.00
		Total 9,551.57 acres

PENDING APPLICATIONS

<u>SERIAL NUMBER</u>	<u>DATE APPLICATION FILED</u>	<u>ACREAGE</u>
Wyoming 098571	February 17, 1960	800.00
" 0102105	March 22, 1960	600.00
" 088110	April 1960	40.00
" 089794	" "	360.00
" 0105119	" "	1920.00
		Total 3,720.00 acres

EXHIBIT C

Title 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

SUBCHAPTER I—MINERAL LEASES

[Circular 2032]

PART 191—GENERAL REGULATIONS APPLICABLE TO MINERAL PER- MITS, LEASES AND LICENSES

PART 192—OIL AND GAS LEASES

SUBCHAPTER Z—WITHDRAWALS, RESTORA- TIONS, AND CLASSIFICATIONS

PART 295—WITHDRAWALS AND RESERVATIONS OF FEDERAL LANDS

Miscellaneous Amendments

1. Section 191.10 is amended by designating the present text as paragraph (a) and by adding thereto a new paragraph (b). The section reads as follows:

§ 191.10 Simultaneous applications or offers for lease.

(a) Where applications or offers received by mail or filed over the counter at the same time are in conflict the right of priority of filing will be determined by public drawing in the manner provided in § 295.8(b) of this chapter.

(b) The priorities of all applications or offers to lease made and filed in accordance with the provisions of § 192.43 of this chapter, whether or not they are in conflict, will be determined by public drawing in the manner provided in § 295.8 of this chapter.

2. Section 192.43 is amended to read as follows:

§ 192.43 Availability of lands to further lease offers where noncompetitive lease expires, is cancelled, relinquished or terminated.

(a) Lands in cancelled or relinquished leases or in leases which terminate by operation of law for non-payment of rental pursuant to 30 U.S.C. sec. 188, which are not withdrawn from leasing nor on a known geological structure of a producing oil and gas field shall be subject to the filing of new lease offers only after notation on the official record of the cancellation, relinquishment, or termination of such lease and only in accordance with the provisions of this section. All lands covered by leases which expire by operation of law at the end of their primary or extended terms shall likewise be subject to the filing of new lease offers only in accordance with the provisions of this section except that notation of such expiration of the leases need not be made on the official records.

(b) On the third Monday of each month or the first working day thereafter if the land office is not officially open for business on the third Monday, the authorized officer of the Bureau of Land Management will post on the bulletin board in each land office a list by subdivision, section, township and range if surveyed or officially protracted, or, if unsurveyed, by the metes and bounds description of the lands in leases which expired, were cancelled, relinquished in whole or in part, or terminated and which will become subject to leasing at 10 o'clock a.m. on the fifth working day thereafter together with a notice stating that the lands in such leases are subject to simultaneous filings of lease offers from the time of such posting until 10 o'clock a.m. on the said fifth working day thereafter.

(c) Each offer to lease must conform with the acreage requirements of § 192.42(d), and must be accompanied by separate checks covering the filing fee and advance rental payment required by the regulations in this chapter. Any offer not so submitted will not be accepted for filing.

(d) If more than one offer to lease all or any part of the acreage covered by an expired, cancelled, relinquished, or terminated lease is filed during the period provided for in paragraph (b) of this section, their priorities will be determined by a public drawing in accordance with § 295.8 of this chapter.

(e) Offers to lease which cover lands not within the foregoing categories and which are received in the same mail or over the counter at the same time, will be considered as having been filed simultaneously and priority to the extent of the conflicts between them will be determined by a public drawing in accordance with the provisions of § 295.8 of this chapter.

(f) If no offers to lease all or any portion of the lands in the expired, cancelled, relinquished or terminated leases are received during the period provided for in paragraph (b) of this section the lands for which no offers are received will thereafter become subject to lease in accordance with regulations in this part.

3. Paragraph (g) of § 192.120 is amended to read as follows:

§ 192.120 Single extension of a noncompetitive lease.

(g) Upon failure of the lessee or the other persons enumerated in paragraph (a) of this section to file an application for extension within the specified period, the lease will expire at the expiration of its primary term without notice to the lessee. Notation of such expiration need not be made on the official records, but the lands covered by such expired lease will be subject to the filing of new lease offers only as provided in § 192.43.

4. Paragraph (a) of § 192.161 is amended to read as follows:

§ 192.161 Cancellation and termination of lease.

(a) Any lease issued after July 29, 1954, or any lease which is extended after that date pursuant to § 192.120 on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental on or before the anniversary date of such lease. However, if the time for payment falls upon any day in which the proper office to receive payment is not open, payment received on the next official working day shall be deemed to be timely. The termination of the lease for failure to pay the rental must be noted on

Published in 24 F. R. December 8, 1959

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the official records of the appropriate Land Office. Upon such notation the lands included in such lease will become subject to the filing of new lease offers only as provided for in § 192.43.

5. Section 295.8(b) is amended by adding thereto a new subparagraph (1) to read as follows:

§ 295.8 Processing of simultaneous applications.

* * * * *

(b) * * *

(1) Notwithstanding the provisions of paragraph (a) of this section, the priorities of all applications or offers to lease made and filed in accordance with the provisions of § 192.43 of this chapter will be determined by public drawing whether or not they are in conflict.

DECEMBER 2, 1959.

ELMER F. BARNETT,
Acting Secretary of the Interior.

[F.R. Doc. 59-10890; Filed, Dec. 7, 1959;
8:47 a.m.]

[Filed October 26, 1962]

EXHIBIT D

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Land office, P.O. Box 929
Cheyenne, Wyoming
July 20, 1960

In reply refer to:

NOTICE

Mr. Melvin A. Brown)
Box 16)
Billings, Montana)

Oil and Gas Holdings

EXCESSIVE ACREAGE

Our records have you charged with a total of 48,919.55 acres as of 5/23/60 of oil and gas interests in the State of Wyoming. If these records are correct, it will necessitate the following action:

- ☒ Rejection of the oil and gas offer(s) filed as simultaneous offers on May 23, 1960.
- ☐ Rejection of the serial numbered oil and gas extension application(s).
- ☐ Rejection of the serial numbered oil and gas assignment application(s).
- ☐ Rejection of the serial numbered oil and gas operating agreement application(s).
- ☐ Cancellation action involving serial numbered oil and gas lease(s).

Unless you can show a material error in our totals within the next 15 days, we will have to proceed with the rejection or cancellation action indicated.

/s/ Cecil L. Hase
Manager

[Filed October 26, 1962]

EXHIBIT E

July 26, 1960

Mr. Gene Malvaney
c/o Bureau of Land Management
P. O. Box 929
Cheyenne, Wyoming

RE: Your Decision July 20, 1960
Acreage Allotment

Dear Gene:

Pursuant to our telephone conversation of the 22nd I am herewith enclosing a list of my Wyoming Federal Oil and Gas Leases and Applications. According to my figures these acres total 45,377.36 acres which amount is under the ceiling as specified in the Oil and Gas Leasing Regulations.

As you can imagine, under the new Simultaneous Filing System it is extremely difficult for the public and myself specifically to keep an accurate schedule of chargeable acreage because many times the results of the previous months drawings and rejections are not received before the new Simultaneous Filing Period begins. Checks were cashed without apparent reason. It has been most confusing.

I await your reply. With best regards, I remain,

Very truly yours,

Melvin A. Brown

MAB/rr
Encl-1

[Filed October 26, 1962]

EXHIBIT F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Land Office
409 Federal Office Building
P.O. Box 929
Cheyenne, Wyoming

In Reply Refer To:
9.20

August 15, 1960

Certified Mail
Return Receipt Requested

DECISION

Mr. Melvin A. Brown
Box 16
Billings, Montana

Offers Rejected in Entirety

The oil and gas lease offers listed below, along with other offers previously rejected, caused your chargeable acreage of interests in oil and gas leases, or offers to lease, to exceed 46,080 acres of Public Domain land in the State of Wyoming. Therefore, pursuant to the provisions of 43 CFR 192.3(e)(2), the following offers to lease are REJECTED in entirety:

Wyoming 0105504
0105574
0109031

Wyoming 0110925
0111198

The statement of holdings which you have furnished does not show to the satisfaction of this office that the above-listed offers did not cause your chargeable acreage of interests in oil and gas leases or offers to lease to exceed the legal limitations.

This decision becomes final 30 days from its receipt unless you appeal it to the Director, Bureau of Land Management. If an appeal is taken, there must be strict compliance with the procedures contained in attached Form 4-1364.

/s/ Cecil L. Hase
Manager

Enclosure

[Filed October 26, 1962]

EXHIBIT G

In reply refer to:

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Wyoming 0105504
0105574
0110925
0111198
5.04g

March 14, 1961

Certified Mail
Return Receipt Requested

DECISION

Melvin A. Brown

:
:
:

Oil and Gas

Decision Affirmed

Mr. Brown has appealed from a decision of the Wyoming Land Office at Cheyenne dated August 15, 1960, which, pursuant to the provisions of 43 CFR 192.3(e)(2), rejected in their entirety his above-identified lease offers, filed on May 23, 1960, under provisions of the Mineral Leasing Act of 1920, as amended (30 U.S.C., 1958 ed., sec. 226), because these offers, along with other offers previously rejected, caused his chargeable acreage of interests in oil and gas leases, or offers to lease, to exceed 46,080 acres of public domain land in the State of Wyoming.

The record was amplified on appeal by a report from the Manager which shows the total acreage held by the appellant prior to the simultaneous filings on May 23, 1960, to be 13,271.57. The record further shows that on May 23, 1960, the appellant filed offers embracing 35,614.10 additional acres for an overall total acreage of 48,885.67 in leases or offers to lease. The lease offers on appeal were the successful offers among the groups of offers filed simultaneously on May 23, 1960, causing the appellant to exceed the acreage limitation of 46,080. The appellant submits that the Secretary lacks statutory authority to promulgate any

regulation which purports to charge acreage embraced in an offer prior to the issuance of a lease. He contends that the decision appealed from failed to state with clarity and particularity the precise respects in which the appellant's statement of holdings is unsatisfactory, and further, that the Manager erroneously charged him with acreage in lease Wyoming 084135 (320 acres) which was committed to the Meridian Ridge unit agreement, and with acreage in Wyoming 0102105 (589.81 acres) on which a lease was issued on June 1, 1960, in the face, he says, of his withdrawal of the offer prior to May 23, 1960. However, aside from the above considerations, the appellant's main contention and basis for this appeal is that his total acreage in leases and offers as of May 23, 1960, would be less than 46,080 if the Manager did not include as chargeable acreage the three offers, Wyoming 088110, 089794 and 0105119, embracing a total of 2,320 acres, which were unsuccessful offers by the appellant in a drawing held prior to May 23, 1960. The appellant states that if this acreage in the three offers and the acreage in the unitized lease, which total an aggregate 2,640 acres, is deducted from the Manager's computation (48,885.67 acres) he is well below the acreage limit. He argues, hypothetically, that to bar an offeror, who filed offers for the maximum acreage which were all unsuccessful at a drawing, from filing another offer until all of the prior unsuccessful offers were rejected, is unsound and illogical. He contends, in addition, that Departmental regulation 43 CFR 192.3(e)(2) was intended to charge the successful offerors with the acreage embraced in their offers and to free the unsuccessful offerors of acreage chargeability. He interprets a memorandum dated April 18, 1960, from the Associate Director to the State Supervisors to place a similar interpretation on this regulation.

The case record in Wyoming 0102105 does not show a withdrawal of that offer was ever filed and the appellant has submitted no evidence to support his contention. Nor has the appellant submitted any evidence to support his contention that all of the land in lease Wyoming 084135 was committed to the Meridian Ridge Unit agreement as of May 23, 1960. Furthermore,

the Geological Survey has advised that the Manager's determination that 320 acres of Wyoming 084135 was not committed to the unit agreement on May 23, 1960, is correct.

As to the appellant's main contention in this appeal, the law (30 U.S.C., 1958 ed., sec. 184) provides for the taking or holding or control under the acreage limitation provisions of the Act. In consonance with the law Departmental regulation 43 CFR 192.3(e)(2) provides:

"If any person holding or controlling leases or interest in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety." (Emphasis supplied)

The memorandum of instructions of the Associate Director, to which the appellant refers, in order to permit holding the drawings at the earliest possible date and for administrative expediency, merely eliminated posting of all the simultaneous offers to acreage control cards and required instead that only the successful and No. 2 offers be posted; it did not, however, relieve the offerors from control over the other simultaneous offers or from being charged with this acreage. An offeror controls acreage, and is chargeable for it, until he withdraws his offers or until the offers are rejected by a land office decision. See Yakutat Development Company et al. 63 I.D. 97 (1956); Cf. Albert C. Massa et al. 63 I.D. 279 (1956). An offeror may eliminate or reduce his chargeable acreage at his own discretion by withdrawing the unsuccessful offers at any time before a lease issues. See 7(a) of lease Form 4-1158.

For the reasons given the Manager's decision is considered proper and is affirmed.

Mr. Melvin A. Brown is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of \$5 for each lease offer included in the appeal. If the appeal covers all lease offers adversely affected by this decision the total filing fee is \$20.00. In taking an appeal there must be strict compliance with the regulations.

/s/A. H. Furr
Appeals Officer

Enclosure

DISTRIBUTION:

Mr. Max Barish, Attorney at Law (Certified Mail)
Mr. Melvin A. Brown (Regular Mail)
Geological Survey (12)
Minerals Staff Officer (4)
SS (Wyoming)
LO (Cheyenne)
AA-3
Case Files
Attorney's Reading File
Permanent File
AO Reading File
WJ

[Filed October 26, 1962]

EXHIBIT H

COPY

MELVIN A. BROWN

A-28923

Decided AUG 31 1962

Oil and Gas Leases: Acreage Limitations--Regulations: Validity

The regulation calling for the rejection of oil and gas lease offers where the acreage in those offers, when added to the acreage in outstanding leases and pending lease offers of the offerors, would exceed the maximum acreage limitation on leases set forth in the Mineral Leasing Act is designed to insure the proper administration of the act and is well within the authority of the Secretary of the Interior as the administrator of that act.

Oil and Gas Leases: Acreage Limitations

In computing an offeror's chargeable acreage, it is proper to include all his pending offers, even though such offers may not have received top priority in drawings of simultaneously filed offers already held.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

COPY

A-28923

Washington 25, D.C.

: Wyoming 0105504, 0105574,
: 0110925, and 0111198

Melvin A. Brown

: Oil and gas lease offers
: rejected

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Melvin A. Brown has appealed to the Secretary of the Interior from a decision by the Appeals Officer, Bureau of Land Management, dated March 14, 1961, affirming the rejection by the manager of the Cheyenne, Wyoming, land office, on August 15, 1960, of four oil and gas lease offers for land in Wyoming, filed by Brown on May 23, 1960,

pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).^{1/} The offers were rejected because they, with other offers simultaneously filed on May 23, 1960, caused Brown's acreage account to exceed 46,080 acres of land in Wyoming under lease or lease offer. 43 C.F.R., 1960 Supp., 192.3(e)(2).^{2/}

Brown points to the acreage limitation on leases imposed by section 27 of the act (30 U.S.C., 1958 ed., sec. 184),^{3/} and challenges the authority of the Secretary under that provision to promulgate a regulation which requires the rejection of offers where the acreage in those offers, together with the acreage in outstanding leases held by the applicant, and the acreage in pending offers previously filed by the same applicant, exceeds the maximum acreage permitted by the statute to be held under lease by any one applicant in a particular State. He contends further, without conceding the validity of the regulation, that because some of his offers which were pending on May 23, 1960, had not drawn top priority in drawings previously held those pending offers should not be considered in determining whether the offers simultaneously filed on May 23, 1960, including the four offers involved in this appeal, caused his acreage account to exceed the maximum allowable in leases and lease offers.

1/ The terms of the Mineral Leasing Act were substantially changed by the Mineral Leasing Act Revision of 1960 (74 Stat. 781). However, all references to the act in this decision will be to the provisions thereof in effect prior to that revision.

2/ "If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety."

3/ " * * * No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one state * * *."

On September 2, 1960, the limitation was raised to 246,080 acres by the Mineral Leasing Act Revision of 1960 (30 U.S.C., 1958 ed., Supp. III, 184(d)).

As to Brown's first contention, section 32 of the act (30 U.S.C., 1958 ed., sec. 189) authorizes the Secretary to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of the act. The Department determined many years ago that in the interest of expediency in the administration of the act and to discourage the filing of offers for leases which the Department is prohibited by section 27 from issuing the limitation imposed by the statute on acreage held under lease should be applied administratively to the acreage included in offers for such leases. W.D. Clack, Walter Butler Slagle, A-24517 (December 12, 1947); John H. Trigg et al., 60 I.D. 166 (1948), On Reconsideration, A-24483 (April 8, 1949); Albert Massa et al., 62 I.D. 339 (1955).

Although the Department, until January 1959 (Circular 2009); 24 F.R. 281), accorded offerors a period of 30 days within which to reduce their holdings in leases and lease offers upon a determination that they held excess acreage without losing priority of filing dates (43 CFR 192.3(c); Albert Massa et al., 63 I.D. 279 (1956), and John H. Anderson, T.K. and Evelyn H. Sterling, 67 I.D. 209 (1960)), this was entirely a matter of administrative discretion.

When it became evident that the granting of an opportunity to an offeror to reduce his holdings within a given time led to abuses of the privilege by some offerors and caused confusion and unnecessary delays in the processing of offers, the grace period was eliminated.

The regulation now in effect does not change in any way the long-standing practice of the Department in refusing to recognize offers filed by applicants who already have under lease or lease offer the maximum acreage permitted. It is a means of according fair treatment to all applicants and insuring that the provisions of section 27 will not be violated. If no limitation were imposed on the acreage that could be included in offers, any person could file for far more acreage than he could receive in leases and then pick and choose what acreage he wanted as his offers were reached for processing. This would enable him to tie up vast acreages of land which he could not possibly hold in leases

and to bargain, for a price, with junior offerors anxious to lease some of the acreage tied up by him. Speculation would be promoted, without any benefit to the public interest in promoting the development of public land. In addition, a staggering administrative burden would be cast upon the Bureau in having to accept, record, and act upon countless offers which were filed with full knowledge that only a portion of them could eventuate into leases. In view of these considerations I have no doubt that the regulation attacked by the appellant is a reasonable regulation, well within the authority of the Secretary in the administration of the act.

Brown's second major contention is that even if the regulation is to be followed and offers charged, only those offers which have first priority should be charged. He contends that because certain of his offers did not draw top priority in previous drawings they are not chargeable to his acreage account. The answer is that he is still maintaining those offers and cannot at the same time urge that they be disregarded. Those offers are, in effect, junior offers which may ripen into leases should the offers which drew higher priority, for some reason, not qualify. As the Department said in the Clack, Slagle case, supra:

"That some of Slagle's various outstanding applications were junior to those filed by others for the same tracts is urged as a reason for excluding these junior applications from consideration in the acreage computation. The remoteness of Slagle's chance to obtain a lease under such applications does not warrant their disregard. Slagle filed and knowingly maintained such applications presumably because he believed they had value to him. He cannot press his applications on the one hand and deny their effectiveness and value on the other. If he had truly considered such applications of no avail, relief was always readily available to him through their voluntary withdrawal."

In his argument Brown speaks of his offers which were drawn No. 2 and No. 3 in drawings held prior to May 23, 1960, as "unsuccessful" and as giving him no "lease priority". From this it is evident that

Brown misconstrues the regulation (43 CFR, 1960 Supp., 192.43) under which his offers were simultaneously filed. That regulation, along with another mentioned therein (43 CFR 295.8), simply establishes the order in which offers simultaneously filed will be considered. The priority list, made up as the result of a drawing, merely assures that the offers will be considered in the same order as that in which they were drawn. It does not bar an offer not drawing first priority from consideration but merely postpones that consideration until offers ahead of it on the priority list are disposed of. Henry S. Morgan, A-28688 (August 30, 1961). Thus offers which draw top priority in a drawing may be termed "successful" and as having "lease priority" only in the event the applicants are qualified to hold a lease.

To apply the regulation on acreage limitations as Brown urges, that is, to charge only offers that are first in line, would undoubtedly create a tremendous administrative problem. It is common occurrence that many offers are filed which conflict as to some land. Offers A, B, and C may all include Tract 1. Offers A and B may also include Tract 2; offers B and C, Tract 3; offers A and C, Tract 4; and all the offers additional land not in conflict. To determine chargeability, as Brown insists, would require a determination as to which offer had priority as to which tract. This determination would not only have to be made as of the dates when the offers were filed but also at any later date when an offer might be amended or acted upon. For example, in the case described, if, after offers A, B, and C were filed, offer A were relinquished or rejected as to Tract 1, offer B would then become chargeable with Tract 1. The complexities that could arise from such a procedure would be enormous, particularly when it is remembered that a single offer may include as much as 2,560 acres (64 legal subdivisions of 40 acres each). To mention these difficulties is to establish that the Department never intended that the regulation in question should have the meaning urged by the appellant.

Brown contends that the recently adopted system of posting available acreage on the third Monday of each month and providing for the

simultaneous filing of offers for such lands is confusing because sometimes the results of the previous month's drawing are not known before the available lands to be included in the following month's drawing are posted.

We see no reason why confusion should result from this method of making lands available for leasing. An offeror knows, or certainly should know, how much acreage he applied for out of what may have been available in the previous month and he knows that that acreage is chargeable to his acreage account so long as he is maintaining those offers. He may at any time withdraw his previous offers but while he is maintaining them, whether before or after a drawing, he is chargeable with the acreage included therein. Cf. Edwin G. Gibbs, 68 I.D. 325 (1961). Thus it should not be difficult for him to compute the acreage with which he is chargeable. He need only to total the acreage included in his outstanding offers. On the other hand, as pointed out earlier, if he were to be charged only with respect to acreage as to which his offers had first priority, he would indeed have great difficulty in determining his chargeability on any given date because it could be affected by action taken on prior offers filed by others as to which he had no notice.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Appeals Officer, Bureau of Land Management is affirmed.

/s/ Edward W. Fisher
Deputy Solicitor

[Filed October 26, 1962]

EXHIBIT I

COPY

MAX BARASH
Attorney at Law

* * *

* * *

September 5, 1962

Hon. Edward W. Fisher
Deputy Solicitor
Department of the Interior
Washington 25, D.C.

Re: Departmental Decision
August 31, 1962
A-28923

Dear Mr. Fisher:

This morning I received your decision of August 31, 1962, on the appeal of Melvin A. Brown (A-28932). Needless to say, the decision is most disappointing.

Among other things, I am distressed by the penultimate paragraph of the decision. As you will recall, I was granted the opportunity to present oral argument informally on August 16. You were good enough to give me ample time to present my argument which I did in the hope that some of the salient issues involved in the appeal would be focused more sharply. I find it difficult, therefore, to understand why the last sentence of the penultimate paragraph states that no useful purpose would be served by oral argument and that the request is accordingly denied. Having reported the oral argument to my client, Mr. Brown, this places me in an embarrassing position.

Aside from the foregoing, one of the principal arguments stressed in my brief and also in the oral argument of August 16 is the fact that the pertinent regulation 43 CFR 192.3(e)(2), is silent as to whether acreage included in unsuccessful offers continues to be chargeable under the acreage limitation provisions of the statute. Applying the principle enunciated by the Department in the case of Donald C. Ingersoll, 63 I.D. 397, I pointed out that because the regulation is far from clear the appellant should not be penalized for alleged noncompliance therewith.

Yet, not a single word is addressed to this point in your decision of August 31. Moreover, the reasons advanced and the examples given on page 6 of the decision to justify the conclusion therein reached are completely theoretical and not in point. The examples given may have some bearing on the chargeability of acreage prior to a drawing but they have no bearing at all after the drawing is held.

In the circumstances outlined, I shall appreciate an opportunity to meet with you at your convenience to discuss this case.

Sincerely yours,

MAX BARASH

[Filed October 26, 1962]

EXHIBIT J

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

* * *

A-28923

September 14, 1962

Mr. Max Barash
Attorney at Law
711 Fourteenth Street, N.W.
Washington 5, D.C.

Dear Mr. Barash:

I have your letter of September 5 expressing dissatisfaction with our decision of August 31, 1962, on the appeal of Melvin A. Brown (A-28923).

The decision was very thoroughly considered before it was issued and I do not believe that any change in it on the merits of the case is warranted.

However, I have no objection to deleting from the decision the next to the last paragraph referring to your request for oral argument. Accordingly, there is enclosed a new page 7 to be substituted for pages 7 and 8 of the copy of the decision sent to you.

Sincerely yours,

/s/ Edward W. Fisher
Deputy Solicitor

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MELVIN A. BROWN,
Plaintiff,

v.

STEWART L. UDALL,
Secretary of the Interior
Defendant

Civil Action No. 3352-62

ANSWER

Defendant, by his attorney, Thos. L. McKevitt, Attorney,
Department of Justice, for his answer says:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The United States, a sovereign not amenable to suit, is an indispensable party.

Third Defense

I

Defendant admits the allegations in paragraph 1.

III

Defendant admits the allegations in paragraph 2.

III

Defendant does not have information sufficient to form a belief with respect to the truth or falsity of the allegations in paragraph 3.

IV

The allegations in paragraph 4 are conclusions of law that require no answer.

V

Defendant denies the allegations in paragraph 5.

VI

Defendant admits the allegations in the first subparagraph of paragraph 6, denies the allegations in the last sentence of that

paragraph and says that the terms of the Mineral Leasing Act of 1920 speak for themselves.

VII

Defendant admits the allegations in the first two sentences in paragraph 7. Defendant admits that the regulations referred to in paragraph 7 and appearing as Exhibits A and B to the complaint were promulgated. Defendant denies that the amended regulation was the first notice to the public that pending applications were to be included in computing the 46,080-acre limitation. The allegations in the last two subparagraphs in paragraph 7 are denied, except to the extent that the provisions of 43 C.F.R. sec. 192.3(a) and 43 C.F.R. sec. 192.3(e)(2) are therein correctly quoted.

VIII

The allegations in the first subparagraph of paragraph 8 are admitted. Prior to May 23, 1960, the Bureau of Land Management had determined that plaintiff was not the first person making application for leases on some of the lands included in plaintiff's then pending applications. However, at that time the Bureau of Land Management had not determined whether the persons who were the first ones to apply for such leases were qualified to hold the leases and no leases had been issued. After the drawing plaintiff did not withdraw his applications, which meant that he remained eligible to obtain the leases in the order in which his applications were drawn should the one drawn first and any others drawn before plaintiff's be found ineligible to receive a lease. Thus, until it was determined that the offerors who had acquired priority ahead of plaintiff were qualified to have leases issued to them there was a possibility of plaintiff's acquiring leases on the acreage included in those offers. Accordingly, plaintiff, at the time his applications were filed, was properly held chargeable with the acreage included in his unwithdrawn applications and it was so held in the defendant's decision.

IX

The allegations in the first four sentences of paragraph 9 are admitted. Defendant is without information sufficient to form a belief with respect to the truth or falsity of the remaining allegations of paragraph 9, except the allegations in the last sentence with respect to which defendant admits that plaintiff was charged with the acreage included in his applications but denies that the referenced regulation is invalid or unauthorized. It is specifically provided in 43 C.F.R. (1961 Supp.) sec. 192.3(e)(2) as follows:

If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety.

X

Defendant admits the allegations in paragraph 10, except the allegations in the last sentence which are denied. The purpose of a drawing is to establish priority of consideration only and the fact that an offeror may draw first priority consideration does not cause the offeror to be the first qualified applicant for the lease. When consideration was given to those offers it was found that plaintiff was not qualified because his chargeable acreage, including his pending unwithdrawn applications, exceeded the statutory limitation.

XI

With respect to paragraph 11, defendant says that the allegations in the first sentence constitute a conclusion of law, says that the terms of the Mineral Leasing Act of February 25, 1920, referred to in the second sentence, speak for themselves and denies the allegations in the third and fourth sentences, except to the extent that these allegations correctly paraphrase the decision of the Director, Bureau of Land Management.

XII

Defendant admits the allegations in paragraph 12.

XIII

With respect to the allegations in paragraph 13, defendant says that the decision of the Cheyenne Land Office, which appears as Exhibit F to the complaint, speaks for itself. Defendant denies that the action represented by that decision was contrary to or in violation of the statute.

XIV

Defendant admits the allegations in the first two sentences and the allegations in the last sentence of paragraph 14, but denies the remaining allegations in that paragraph.

XV

With respect to the allegations in paragraph 15, defendant admits that plaintiff filed a timely appeal to the Secretary of the Interior, admits that Exhibit H is a true copy of the Deputy Solicitor's decision and admits that the correspondence appearing as Exhibits I and J was exchanged. Defendant denies the remaining allegations in paragraph 15 not herein specifically admitted.

XVI

Defendant admits the allegations in paragraph 16.

XVII

Defendant denies the allegations in paragraph 17.

WHEREFORE, defendant demands that the complaint be dismissed and that he be awarded his costs.

/s/ Thos. L. McKevitt
Attorney, Department of Justice
* * *

Attorney for Defendant

[Certificate of Service]

[Filed April 19, 1963]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant, Stewart L. Udall, Secretary of the Interior, by his attorney, Thos. L. McKevitt, Attorney, Department of Justice, moves the Court for summary judgment on the following grounds:

1. The complaint fails to state a claim upon which relief can be granted.
2. There is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

This motion is made on the basis of the pleadings filed herein.

/s/ Thos. L. McKevitt
Attorney, Department of Justice
* * *

Attorney for Defendant

[Certificate of Service]

[Filed April 19, 1963]

DEFENDANT'S STATEMENT OF MATERIAL FACTS
PURSUANT TO RULE 9, AS AMENDED

1. As it existed between 1954 and 1961, Section 27 of the Mineral Leasing Act of 1920, 30 U.S.C. (1958 ed.) sec. 184, read as follows:

No person, association or corporation except as herein provided shall take or hold at one time oil or gas leases exceeding any aggregate 46,080 acres granted hereunder in any one state. At the time pertinent here the Secretary of the Interior had provided by regulation, 43 C.F.R. (1960 Supp.) sec. 192.3(e)(2), as follows:

If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application

or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety. (Underscoring supplied.)

2. As of March 1, 1960, the plaintiff held in the State of Wyoming public domain oil and gas leases totaling 9,551.57 acres. On February 17, 1960, March 22, 1960, and on various dates in April, 1960, plaintiff filed applications for public domain oil and gas leases in Wyoming totaling an additional 3,720 acres, giving him a chargeable total of 13,271.57 acres. Early in May a drawing was held involving, among other lands, the 3,720 acres in plaintiff's lease applications. Plaintiff drew number one as to 680 acres of that total and was subsequently issued a lease covering that 680 acres. Although not drawing number one as to the remaining 3,040 acres in his applications plaintiff did not withdraw his applications. As of May 23, 1960, no action had been taken to issue leases to anyone as to the 3,040 acres. Thus, on that date plaintiff continued to be charged with a total of 13,271.57 acres.

3. With this situation as to acreage plaintiff, on May 23, 1960, filed applications for an additional 36,614.10 acres. In a drawing involving these lands held at a later date plaintiff drew number one with respect to a total of 5,065.63 acres. These are the lands described in Appendix A to the complaint and constitute the particular lands involved in this litigation. The Manager rejected plaintiff's applications as to these 5,065.63 acres because, on the date they were filed, plaintiff was over acreage (9,551.57 acres in leases, 3,720 acres in unwithdrawn applications filed before May 23, 1960, and 35,614.10 acres filed on May 23, 1960, or a total of 48,885.67--against a maximum allowable of 46,080 acres). In rejecting the applications the Manager pointed out that, pursuant to the provisions of 43 C.F.R. sec. 192.3(e)(2), an application or group of applications which cause an applicant to exceed the acreage limitation must be rejected (Ex. F to complaint). On appeal both the Director, Bureau of Land Management (Ex. G to complaint), and the Secretary (Ex. H to complaint) affirmed.

Respectfully submitted,

/s/ Thos. L. McKevitt
Attorney, Department of Justice

* * *

[Filed June 3, 1963]

**PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND RESPONSE TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Plaintiff, by his attorney, moves the Court for summary judgment pursuant to Rule 56 F.R. Civ. P., in accordance with the relief sought in the complaint. This motion is based on the following grounds:

1. There is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

2. The material facts are established by the allegations of the complaint and by the admissions of the answer.

3. A statement of the material facts as to which there is no genuine issue is set forth in plaintiff's statement and counterstatement under Rule 9 H which is annexed hereto in support of this motion for summary judgment.

For his response to defendant's motion for summary judgment the plaintiff adopts the Memorandum of Points and Authorities submitted herewith.

Respectfully submitted,

/s/ Max Barash
* * *

Attorney for Plaintiff

[Certificate of Service]

[Filed June 3, 1963]

**PLAINTIFF'S STATEMENT AND COUNTER-
STATEMENT UNDER RULE 9 H OF MATERIAL
FACTS AS TO WHICH THERE IS NO GENUINE
ISSUE, IN SUPPORT OF PLAINTIFF'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 9 H of the Rules of this Court, the plaintiff submits in support of his cross-motion for summary judgment the following statement of material facts as to which there is no genuine issue.

1. Plaintiff adopts Paragraph 1 of defendant's statement of material facts. Plaintiff refers to other statutes and regulations contained in paragraphs 6 and 7 of the complaint as pertinent hereto.

2. Plaintiff adopts Paragraph 2 of defendant's statement of material facts except as to the last eight words in the first sentence thereof reading "giving him a chargeable total of 13, 271.57 acres" and except as to the last sentence in its entirety reading "Thus, on that date plaintiff continued to be charged with a total of 13,271.57 acres." The language in quotations is a conclusion of law which is one of the issues in this litigation.

3. Plaintiff adopts Paragraph 3 of defendant's statement of material facts except that in the first sentence the correct figure is 35,614.10 acres rather than "36,614.10" acres (this appears to be a typographical error since the correct figure appears later in the same paragraph); except that in the third sentence the lands described in Appendix A to the complaint as constituting the particular lands in this litigation total 3,145.63 acres, not 5,065.63 acres; and except that the propriety of the actions referred to in the fourth, fifth and sixth sentences is in issue in this litigation.

Respectfully submitted,

/s/ Max Barash

* * *

Attorney for Plaintiff

TRANSCRIPT OF PROCEEDINGS - ORAL OPINION OF THE COURT

1

Washington, D.C.
September 13, 1963

The above cause came on for hearing of motions before THE
HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

* * * * *

2 **THE COURT:** The Court is of the opinion that the regulation is a valid implementation of the statute. It does not transcend the statute but is merely a means of facilitating its administration in situations which otherwise might be difficult or confusing.

The Court is further of the opinion that the Secretary did not misapply the statute in the situation involved in this case.

In view of these considerations, the Court will grant the defendant's motion for summary judgment and deny the plaintiff's motion.

You may submit an order accordingly.

[Filed September 17, 1963]

JUDGMENT

This case having come on for hearing on defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment and it appearing that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law,

IT IS THEREFORE ORDERED:

1. Plaintiff's cross-motion for summary judgment is denied.
2. Defendant's motion for summary judgment is granted.
3. Judgment is entered in favor of the defendant and against the plaintiff and the complaint is dismissed.

Dated this 17th day of September, 1963.

/s/ Alexander Holtzoff
Judge, United States District Court

[Certificate of Service]

[Filed November 6, 1963]

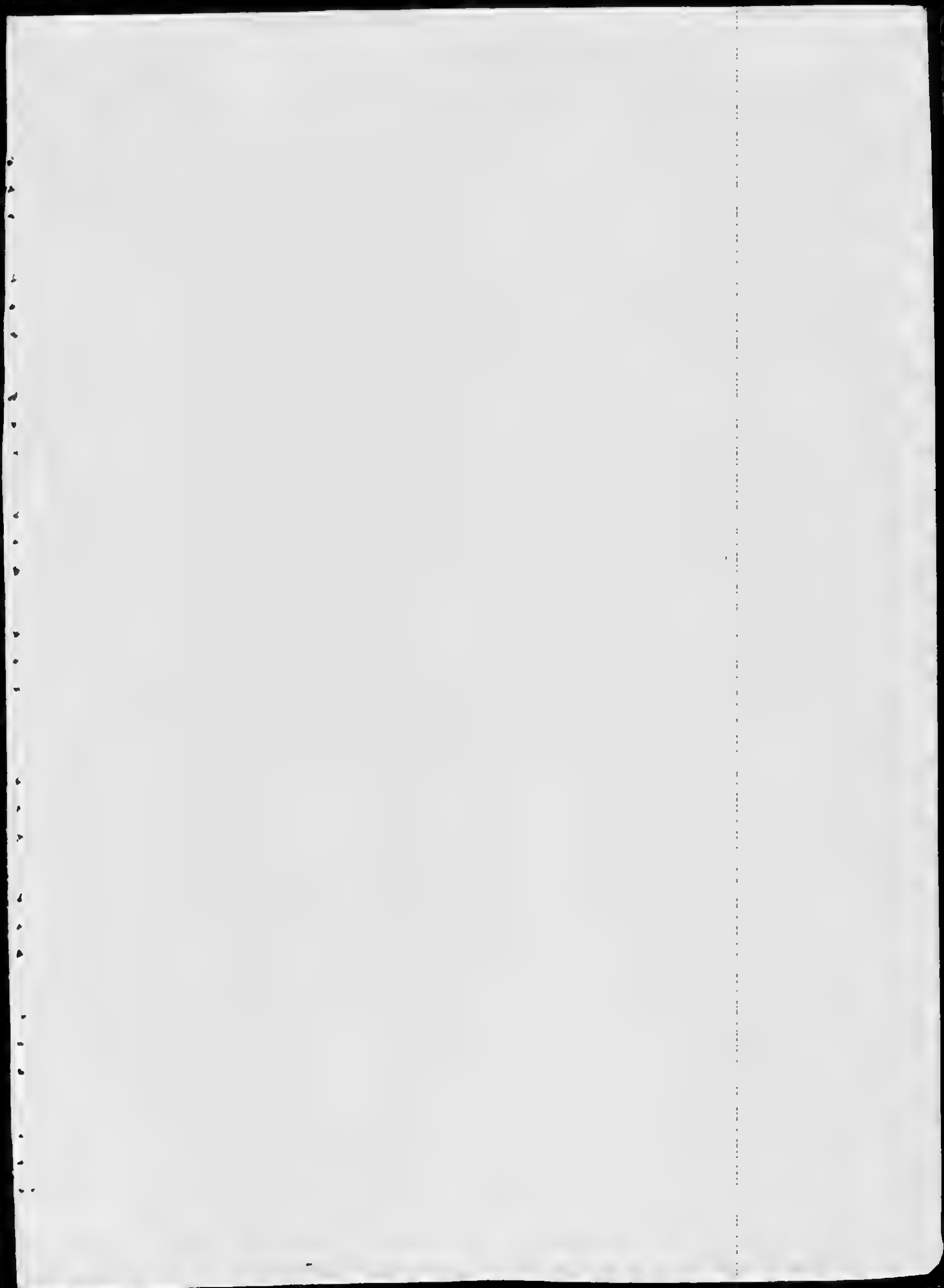
NOTICE OF APPEAL

Notice is hereby given this 6th day of November, 1963, that the plaintiff, Melvin A. Brown, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of September, 1963, in favor of the defendant.

/s/ Max Barash
* * *

Attorney for
Melvin A. Brown, Plaintiff

[Certificate of Service]



BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,274

MELVIN A. BROWN,

Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,

Appellee.

Appeal from a Judgment of the United States District Court
For the District of Columbia Dismissing the Complaint

United States Court of Appeals
for the District of Columbia Circuit

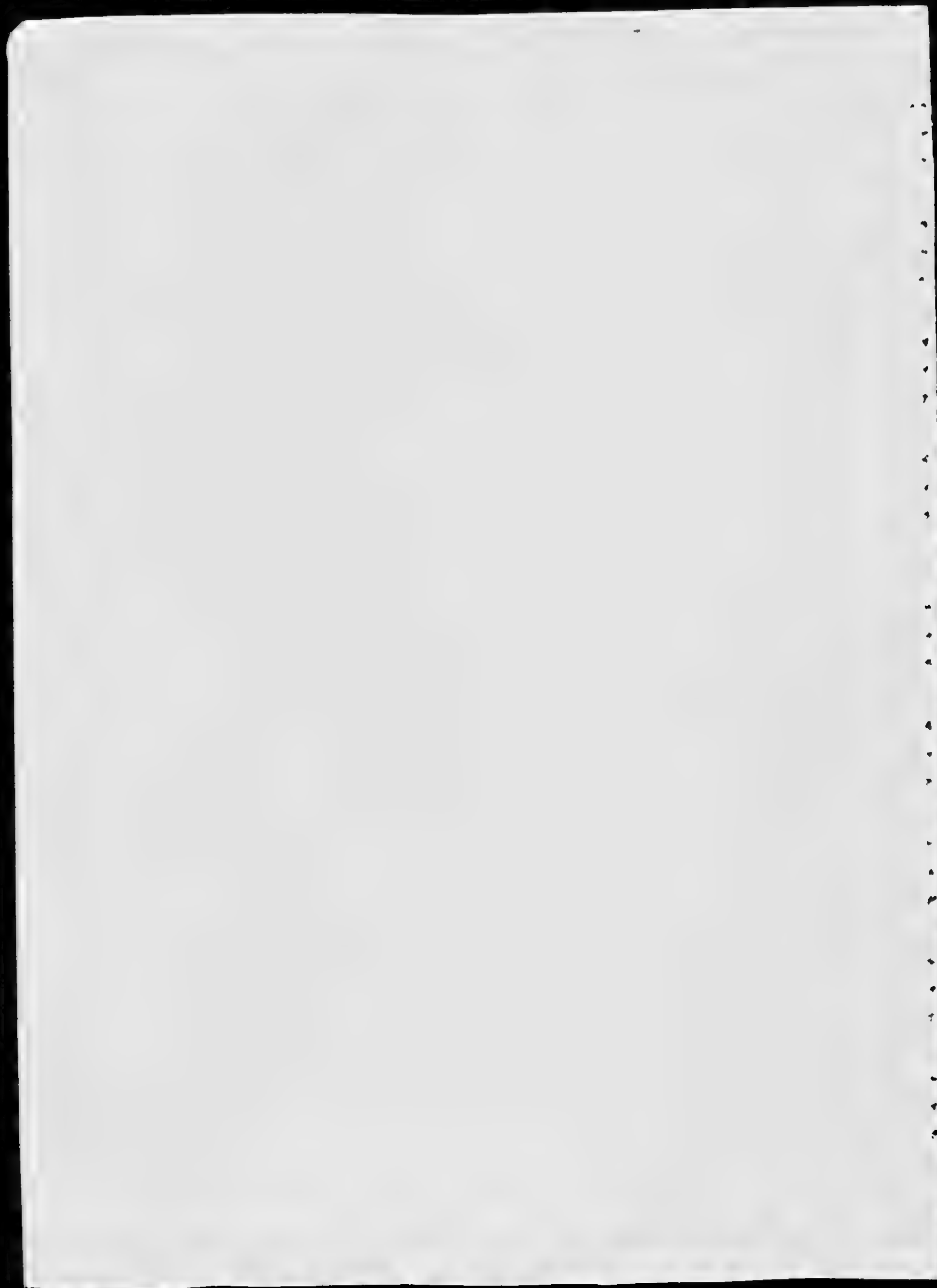
FILED JAN 30 1964

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Attorney for Appellant.



QUESTIONS PRESENTED

Prior to May 23, 1960, the critical date in the proceeding, plaintiff-appellant held in the State of Wyoming public domain oil and gas leases totalling 9,551.57 acres, well below the maximum of 46,080 acres authorized by the then controlling statute. At no time since the Mineral Leasing Act became a law in 1920 has the statute ever prescribed any acreage limitation on applications for oil and gas leases. Nevertheless, on January 8, 1959, almost 39 years later the Secretary approved an amendatory regulation expressly providing that the statutory limitation of 46,080 acres of leases in one State also encompasses applications for leases. Pursuant to this regulation the Secretary charged appellant with a total of 3,720 acres in applications pending prior to May 23, 1960, although he was the person first making application and entitled to priority to lease only 680 acres. Pursuant to the same regulation the Secretary charged appellant with a total of 35,614.10 acres in applications filed on May 23, 1960, although he was later determined to be entitled to priority to lease only 5,065.63 acres which includes the land in suit. The Secretary then rejected appellant's successful applications as to the latter 5,065.63 acres on the ground that on May 23, 1960, he held in the aggregate in excess of the statutory limit of 46,080 acres in the State. The Secretary reached this conclusion by adding appellant's outstanding leases totalling 9,551.57 acres, the applications pending prior to May 23, 1960, for 3,720 acres, and the applications filed on May 23, 1960, for 35,614.10 acres - for an overall total of 48,885.67 acres. The questions presented follow.

Question 1. Whether the Secretary's amendatory regulation 43 CFR 192.3 approved January 8, 1959 (Circular 2009), providing that applications or offers for leases are to be charged against the statutory acreage limitation on lease holdings is unlawful, unauthorized, and a usurpation of the legislative function in view of the mandatory language of the statute providing that " * * * no person * * * shall take or hold at

(ii)

one time oil and gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one state * * *".

Question 2. Whether the Secretary's amendatory regulation 43 CFR 192.3(e)(2) pursuant to which appellant's applications for leases were charged in their entirety against the statutory 46,080 acre limitation on oil and gas leases is arbitrary, unreasonable and capricious and in violation of the statute where:

(a) The statute provides that only the person first filing an application for a lease who is qualified shall be entitled to a lease without competitive bidding;

(b) Appellant's applications embracing 3,720 acres filed prior to May 23, 1960, were included in a drawing held before that date at which he was determined to be first and successful as to 680 acres and unsuccessful as to the remainder;

(c) Appellant's applications embracing 35,614.10 acres filed on May 23, 1960, were determined after a drawing to be first and successful as to 5,065.63 acres and unsuccessful as to the remainder;

(d) The Secretary has successfully maintained in this Court that an applicant for an oil and gas lease acquires no vested rights against the United States, the Secretary having discretion to accept or reject applications for leases.

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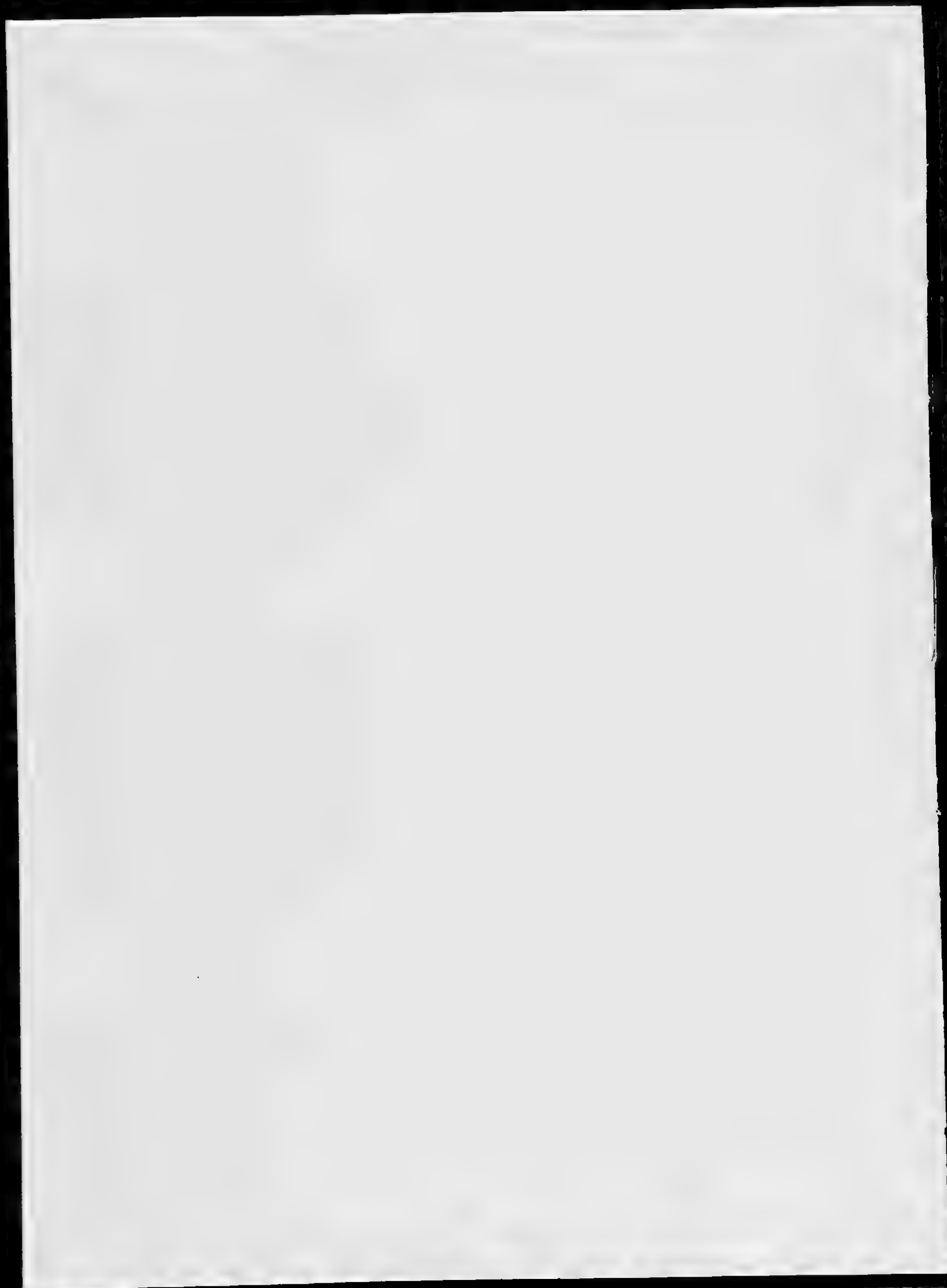
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,274

MELVIN A. BROWN,

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v.

STEWART L. UDALL,
Secretary of the Interior,

Appellee.

Appeal from a Judgment of the United States District Court
For the District of Columbia Dismissing the Complaint

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia entered September 17, 1963, granting the defendant's motion for summary judgment and dismissing the complaint. The appeal was filed November 6, 1963 (JA 48). The jurisdiction of the district court is founded on Title 11, Section 306, of the District of Columbia Code and upon the ground that the matter in controversy arose under the laws of the United States. This Court has jurisdiction under 28 U.S.C. 1291.

OPINION BELOW

The opinion of the district court is not reported. It is set out at pages 46 to 47 of the Joint Appendix.

STATEMENT OF THE CASE

This is an appeal from the judgment of the district court granting the defendant's motion for summary judgment and dismissing the complaint which seeks judicial review of the unlawful and arbitrary actions of the Secretary of the Interior (hereinafter referred to interchangeably as Secretary or appellee) described in the complaint and of the Secretary's action in failing and refusing to issue to appellant (plaintiff below) noncompetitive oil and gas leases covering the land in suit to which appellant, as the first qualified applicant, is entitled under the statute.

The critical date with which we are here concerned is May 23, 1960. On that date and for a number of years prior thereto, the controlling statute, 30 U.S.C., 1958 ed., sec. 184, provided that no person may hold in any one State oil and gas leases exceeding 46,080 acres.¹ On January 8, 1959, almost 39 years after the Mineral Leasing Act became law,² the Secretary for the first time issued an amendatory regulation 43 CFR 192.3³ expressly providing that the statutory 46,080 acre limitation on oil and gas leases also includes applications for leases. Appellant contends that the Secretary's regulation is in violation of the statute and constitutes an attempt by the Secretary to make law, rather than to administer the statute as enacted by Congress.

In addition, the controlling statute, 30 U.S.C., 1958 ed., sec. 226, provides that as to lands not within a known geological structure of a producing oil or gas field, the person first making an application for a

¹ On September 2, 1960, the limitation was raised to 246,080 acres by the Mineral Leasing Act Revision of 1960 (30 U.S.C., 1958 ed., Supp. IV, 184(d)).

² Act of February 25, 1920 (41 Stat. 437).

³ This regulation is identified as Circular 2009 and was published in Volume 24 Federal Register at page 281 (JA 16).

lease who is qualified shall be entitled to a lease without competitive bidding. Despite the statute, the Secretary's regulations provide that when simultaneous applications are filed by a number of applicants for the same land which necessitates a drawing to select the successful applicant, then automatically determined to be the person first making an application for a lease within the meaning of the statute, each applicant in the drawing is nevertheless charged before the drawing is held with the acreage in his application against the 46,080 acre limitation on oil and gas leases. Since the successful applicant entitled to priority to a lease under the statute as the person first making an application for a lease cannot be determined until after the drawing is held, the Secretary's regulation lacks statutory authorization and is invalid. Further, the Secretary has held that even after the drawing is held and the successful applicant drawn No. 1 is determined, the unsuccessful applicants in the drawing for the same land continue to be charged with the acreage in their unsuccessful applications against the statutory 46,080 acre limitation on oil and gas leases until their applications are withdrawn. This, too, has no statutory authorization and constitutes an attempt by the Secretary to make law.

With this preliminary statement we turn to the facts in this case with respect to which there is no dispute. Borrowing from appellee's statement of material facts in the court below (JA 43), which appellant's statement adopted (JA 45), the essential facts are briefly summarized as follows:

1. As it existed between 1954 and 1961, Section 27 of the Mineral Leasing Act of 1920, 30 U.S.C. (1958 ed.) sec. 184, read as follows:

No person, association or corporation except as herein provided shall take or hold at one time oil or gas leases exceeding in the aggregate 46,080 acres granted hereunder in any one state.

At the time pertinent here the Secretary of the Interior had provided by regulation, 43 CFR (1960 Supp.) sec. 192.3(e)(2), as follows:

If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety. (Underscoring supplied.)

2. As of May 23, 1960, appellant held in the State of Wyoming public domain oil and gas leases totalling 9,551.57 acres. On February 17, 1960, March 22, 1960, and on various dates in April, 1960, appellant filed applications for public domain oil and gas leases in Wyoming totalling an additional 3,720 acres. Early in May a drawing was held involving, among other lands, the 3,720 acres in appellant's lease applications. Appellant drew number one as to 680 acres of that total and was subsequently issued leases covering the 680 acres. Although not drawing number one as to the remaining 3,040 acres in his applications appellant did not withdraw his applications. As of May 23, 1960, no action had been taken to issue leases to anyone as to the 3,040 acres.

3. With this situation as to acreage appellant, on May 23, 1960, filed 30 applications for an additional 35,614.10 acres. In a drawing involving these lands held at a later date appellant drew number one with respect to a total of 5,065.63 acres. These to the extent of 3,145.63 acres are the lands described in Appendix A to the complaint and constitute the particular lands involved in this litigation.

On the basis of the foregoing agreed statement of facts it is conceded by the Secretary that prior to May 23, 1960, appellant held in the State of Wyoming outstanding oil and gas leases totalling only 9,551.57 chargeable acres against the statutory limit of 46,080 acres. For the convenience of this Court these leases are hereinafter set forth by serial number, date of issuance, and amount of acreage in each lease.

<u>Serial Number</u>	<u>Date Lease Issued</u>	<u>Acreage</u>
W-098681	May 1, 1960	400.00
W-098616	May 1, 1960	396.45
W-091222	March 1, 1960	470.55
W-089866	January 1, 1960	438.68
W-088008	February 1, 1960	960.00
W-089658	February 1, 1960	80.00
W-093001	March 1, 1960	872.39
W-093022	February 1, 1960	320.00
W-093209	March 1, 1960	793.28
W-091640	March 1, 1960	1,299.15
W-089729	December 1, 1959	80.00
W-089683	December 1, 1959	640.00
W-089681	December 1, 1959	80.00
W-088372	December 1, 1959	40.00
W-087867	December 1, 1959	80.00
W-086799	December 1, 1959	760.00
W-086764	December 1, 1959	242.84
W-086676	December 1, 1959	320.75
W-086613	December 1, 1959	157.48
W-085912	November 1, 1959	160.00
W-085752	November 1, 1959	640.00
W-084135	March 1, 1960	<u>320.00</u>
Total		9,551.57 acres

It is conceded also by the Secretary that prior to May 23, 1960, there were pending in the Cheyenne, Wyoming, land office of the Bureau of Land Management applications for leases filed by appellant identified as follows:

<u>Serial Number</u>	<u>Date Application Filed</u>	<u>Acreage</u>
Wyoming 098571 ⁴	February 17, 1960	800.00
Wyoming 0102105	March 22, 1960	600.00
Wyoming 088110 ⁵	April 1960 (drawn No. 3 in drawing held May 4, 1960)	40.00
Wyoming 089794 ⁶	April 1960 (drawn No. 3 in drawing held May 4, 1960)	360.00
Wyoming 0105119 ⁷	April 1960 (drawn No. 2 in drawing held May 4, 1960)	<u>1,920.00</u>
Total		3,720.00 acres

As of May 23, 1960, appellant knew that his total chargeable acreage under outstanding oil and gas leases in the State of Wyoming was 9,551.57 acres, well below the statutory limit of 46,080 acres. He had no reason to believe that the Cheyenne land office considered him chargeable with the full 3,720 acres embraced in the five applications described above. Appellant believed that at most he was theoretically chargeable on May 23, 1960, with a total of 680 acres as to which he was the first qualified applicant entitled to priority and for which leases were subsequently issued to him.⁸ Even adding the aforesaid 680 acres to the 9,551.57 acres held under lease gave him a total of only 10,231.57 acres.

⁴ As of May 23, 1960, appellant had priority to lease only 80 acres out of the 800 acres in the offer. The remaining 720 acres had been leased on May 1, 1960, to a third party under lease Wyoming 098592. Appellant's lease offer Wyoming 098571 was rejected May 24, 1960, as to the 720 acres for which a prior lease was issued on May 1, 1960. The Secretary nevertheless arbitrarily charged appellant with the 720 acres in face of the long established rule of the Department reaffirmed in Edwin G. Gibbs et al., 67 I.D. 229 (1960) that

"* * * land included in outstanding leases is not available for leasing to others and that offers to lease such land must be rejected. The rule has been followed by the Department since the beginning of adjudications under the Mineral Leasing Act * * *".

⁵ Appellant was charged as of May 23, 1960, with the acreage in this application notwithstanding that it was drawn No. 3 in a drawing held on May 4, 1960, and did not acquire priority to a lease under the statute.

⁶ Id.

⁷ Id. (except that this application was drawn No. 2).

⁸ This includes 80 acres in lease Wyoming 098571 and 600 acres in lease Wyoming 0102105.

On May 23, 1960, appellant filed in the Cheyenne land office 30 applications for oil and gas leases covering a total of 35,614.10 acres of public domain lands.⁹ These applications were found to be simultaneous with applications filed by others for the same lands thus requiring a public drawing to be held under the applicable regulation¹⁰ to determine the successful applicant entitled to priority. The drawing was held on June 7, 1960. In this drawing, appellant was unsuccessful as to all the applications except four totalling 3,145.63 acres which are the subject of this suit¹¹ and one which he elected to drop.¹² Following the drawing of June 7, 1960, the Manager of the Cheyenne land office, by decision of August 15, 1960,¹³ rejected in their entirety the applications covering the land in suit on the ground that the total of appellant's outstanding leases when added to the applications pending prior to May 23, 1960, and applications filed on that date exceeded the statutory limit of 46,080 acres in the State of Wyoming.

Appellant then filed a timely appeal to the Director, Bureau of Land Management. By decision of March 14, 1961,¹⁴ the Director affirmed the Manager stating (JA 29):

"As to the appellant's main contention in this appeal, the law (30 U.S.C., 1958 ed., sec. 184) provides for the taking or holding or control under the acreage limitation

⁹ In filing the 30 applications embracing a total of 35,614.10 acres, appellant did so bearing in mind that with the 9,551.57 acres under lease, and with the 680 acres under applications to which he had priority and was entitled to leases, his over-all total of 45,845.67 acres would be below the statutory limit of 46,080 acres. While plaintiff did not agree that the Secretary had authority to provide by regulation that acreage in mere applications should be included in the statutory limit, he nevertheless undertook to comply therewith.

¹⁰ 43 CFR 191.10 approved December 2, 1959, Circular 2032 (JA 22).

¹¹ Appendix A to the complaint (JA 15).

¹² The application dropped by appellant contained 1,920 acres. Out of a total of 35,614.10 acres in 30 applications, appellant was successful and acquired priority in the drawing as to 5,065.63 acres in 5 applications.

¹³ Exhibit F to the complaint (JA 26).

¹⁴ Exhibit G to the complaint (JA 27).

provisions of the Act. * * * (Emphasis Bureau's, not mine.)

Referring to Departmental regulation 43 CFR 192.3(e)(2) as being in consonance with the law the Director went on to say that (JA 29):

"An offeror controls acreage, and is chargeable for it, until he withdraws his offers or until the offers are rejected by a land office decision. * * * (Emphasis added.)

Thereafter, appellant filed a timely appeal to the Secretary. By decision of August 31, 1962,¹⁵ the Secretary upheld the Bureau of Land Management. This decision ignored the plain and unequivocal language of the statute prescribing a maximum acreage limitation of 46,080 acres of leases that may be held in any one State and attempted to justify the Secretary's power to issue the regulations here in issue by virtue of Section 32 of the Mineral Leasing Act which authorizes the Secretary to prescribe necessary and proper rules and regulations to carry out and accomplish the purposes of the Act. In the argument that follows later, we shall establish that the Secretary's regulations are neither necessary nor proper to carry out the purposes of the Act and that in fact they are inconsistent with and in conflict with the Act.

STATUTES AND REGULATIONS INVOLVED

Section 27 of the Act of February 25, 1920, as amended by the Act of August 2, 1954, c. 650, 68 Stat. 648, 30 U.S.C., 1958 ed., sec. 184, provides in pertinent part:

* * * No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State, * * *. (Emphasis added.)

¹⁵ Exhibit H to the complaint (JA 31).

Section 17 of the Act of February 25, 1920, as amended by the Act of August 8, 1946, c. 916, Sec. 3, 60 Stat. 951, 30 U.S.C. 1958 ed., sec. 226, provides in pertinent part:

All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding.

Section 32 of the Act of February 25, 1920, c. 85, 41 Stat. 450, 30 U.S.C. 189, provides in pertinent part:

That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, * * *.

Pertinent excerpts from the Secretary's amendatory regulations approved January 8, 1959, Circular 2009, (JA 16) follow.

43 CFR 192.3(a) provides in pertinent part:

No person, association, or corporation, except as in the act provided, may hold more than 46,080 acres in any one State * * * whether directly through the ownership of leases or interests in leases and applications, or offers therefor or indirectly as a member of an association or associations, or as a stockholder of a corporation or corporations, holding leases or interests therein and applications or offers therefor. * * * (Emphasis added.)

43 CFR 192.3(e)(2) provides that:

If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety.

STATEMENT OF POINTS

The District Court erred:

1. In deciding that "the regulation [43 CFR 192.3, Circular 2009, approved January 8, 1959] is a valid implementation of the statute" and that "it does not transcend the statute but is merely a means of facilitating its administration in situations which otherwise might be difficult or confusing" notwithstanding

(a) that the Secretary's 1959 amendatory regulation providing that applications or offers for oil and gas leases are to be charged against the statutory acreage limitation of 46,080 acres in any one State is illegal, unauthorized and a usurpation of the legislative function in that it flies in the face of the unequivocal and mandatory language of the controlling statute, 30 U.S.C., 1958 ed., sec. 184, which in prescribing acreage limitations speaks only of leases granted and nowhere mentions applications or offers for leases;

(b) that the Secretary improperly and erroneously charged appellant with acreage contained in pending applications which it is conceded were not first in point of time of filing – in direct conflict with and contrary to the controlling statute, 30 U.S.C., 1958 ed., sec. 226, which provides that only "the person first making application for the lease who is qualified * * * shall be entitled to a lease of such lands without competitive bidding," the statute nowhere providing that applicants other than the person first making application shall be entitled to a lease;

(c) that the Secretary, acting pursuant to his unauthorized regulation, charged appellant with acreage contained in pending applications as to which he was not the person first making application despite the fact that the Secretary has long maintained and the United States Court of Appeals for the District of Columbia in Haley v. Seaton, 108 U.S. App. D.C. 257, 261, has decided that "mere applications for leases created no vested rights" and "that the Secretary of the Interior has discretion to accept or reject * * * applications for leases";

(d) that the Secretary's 1959 regulation providing that applications for leases are to be charged against the statutory 46,080 acre limitation on leases erroneously changed a long and continued practice of the Department of many years standing reflected in regulations previously in force and effect.

2. In deciding that "the Secretary did not misapply the statute in the situation involved in this case" notwithstanding

(a) that appellant, on the critical date in this proceeding, May 23, 1960, admittedly held only 9,551.57 acres under leases granted by the Secretary, only 680 acres in pending applications as to which appellant was the person first making application, and if leases are granted for the land in suit totalling 3,145.63 acres, would hold in the aggregate a total of 13,377.20 acres, well below the 46,080 acre limitation on leases prescribed by the controlling statute.

3. In granting the Secretary's motion for summary judgment, in denying the plaintiff's cross-motion for summary judgment, and in dismissing the complaint.

SUMMARY OF ARGUMENT

I

Where the controlling statute, 30 U.S.C., 1958 ed., sec. 184, expressly prescribes an acreage limitation of 46,080 acres of oil and gas leases that may be held in one State the Secretary lacks authority to provide by amendatory regulation 43 CFR 192.3(a) that the statutory acreage limitation also includes applications for leases. The Secretary may not substitute his judgment for that of Congress and attempt to cure any alleged deficiency in the Mineral Leasing Act on the ground that expediency in the administration of the Act constitutes justification for the regulation. Particularly is this true where for a period of approximately 13 years prior to the amendatory regulation the previous regulation pertaining to acreage limitations was expressly made applicable to

leases only and did not include applications for leases. The rule making power of the Secretary to prescribe regulations does not carry with it the power to make law but merely to carry into effect the will of Congress as expressed in the statute. A regulation which is inconsistent, out of harmony, and in conflict with the statute is illegal and a nullity.

II

The Secretary's regulation 43 CFR 192.3(e)(2) pursuant to which the group of simultaneous applications filed by appellant for a total of 35,614.10 acres, including the land in suit, was held to be chargeable acreage against the statutory acreage limitation and was rejected is improper, unauthorized and in conflict with the statute. The statute prescribes acreage limitations as to leases - not applications. Until a drawing is held to determine priority among the simultaneous applications for the same land no one applicant has rights of any kind in view of the statutory requirement that only the person first making application for a lease who is qualified shall be entitled to a lease. After a drawing is held and priority is determined among the simultaneous applications, only the successful applicant is properly chargeable with acreage against the statutory limitation when the lease is issued. Conversely, an unsuccessful applicant in the drawing not having acquired priority to a lease may not lawfully be charged with acreage he is not entitled to receive. Moreover, even a successful applicant in a drawing has no assurance that a lease will be issued to him. It has been judicially determined that the person first making application who is qualified shall be entitled to a lease if the Secretary in his discretion decides to lease the land for oil and gas development. Until a lease is actually issued an applicant is not properly chargeable with acreage.

III

A regulation which requires a general statement to be made in an application for a lease as to whether the applicant's interests in oil and gas leases, applications and offers in the same State exceed 46,080

chargeable acres manifestly cannot be construed as establishing acreage limitations as the Secretary contends but serves merely to call attention to the applicable statute which alone limits acreage holdings under the Act. Otherwise, the words "chargeable acres" in the regulation would have no purpose or significance. The Secretary's contention that he has wide discretion in administering the public lands must be tempered by the well established principle that while the Secretary has latitude in many situations he is bound by the statute.

IV

Aside from the legal aspects of the questions at hand, the Secretary's Department of the Interior has itself over a period of years established the equitable principle that when an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be spelled out so clearly that there is no basis for disregarding his noncompliance. Although that equitable principle is clearly applicable to the facts in the case at bar the Secretary has arbitrarily refused to invoke it here. No regulation having been issued by the Secretary expressly putting appellant on notice that unsuccessful applications in a drawing continue to be charged against statutory acreage limitations until withdrawn by him it is unfair and inequitable to continue to charge him with this acreage thus causing the so-called excess acreage holding and the rejection of the applications for the land in suit.

ARGUMENT

I

The Secretary's Amendatory Regulation 43 CFR 192.3, Approved January 8, 1959, Circular 2009, Providing That Applications or Offers for Leases Are to Be Charged Against the Statutory Acreage Limitation Is Unlawful, Unauthorized and in Excess of the Statutory Power Conferred upon Him by Congress in the Face of the Plain And Unequivocal Language of the Statute Providing That No Person Shall Take or Hold at One Time Oil and Gas Leases Exceeding 46,080 Acres in Any One State.

30 U.S.C., 1958 ed., sec. 184 provides that:

* * * No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State, * * *. (Emphasis added.)

The words of the statute are plain and unambiguous. There is no room to doubt their meaning. The statute speaks of leases which are granted thereunder. It does not speak of applications that may never ripen into leases. Yet the Secretary relies on Section 32 of the Mineral Leasing Act (30 U.S.C., 1958 ed. sec. 189), which authorizes him "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act," as providing the necessary authorization to issue on January 8, 1959, amendatory regulation 192.3(a) the effect of which is to extend or amend the statutory limitation to include applications for leases. This amendatory regulation provides as follows (JA 16):

No person, association, or corporation, except as in the act provided, may hold more than 46,080 acres in any one State * * * whether directly through the ownership of leases or interests in leases and applications, or offers therefor or indirectly as a member of an association or associations, or as a stockholder of a corporation or corporations * * *. (Emphasis added.)

In his decision of August 31, 1962, the Secretary defends his right to promulgate this regulation by stating (JA 33):

* * * The Department determined many years ago that in the interest of expediency in the administration of the act and to discourage the filing of offers for leases which the Department is prohibited by section 27 from issuing the limitation imposed by the statute on acreage held under lease should be applied administratively to the acreage included in offers for such leases. * * *

We submit that expedience does not justify the Secretary attempting to amend an Act of Congress by a regulation such as 43 CFR 192.3(a). It is incumbent on Congress to make the law - not for the Secretary to do so. He may not substitute his judgment for that of Congress as to what the law should have provided; nor may he attempt to cure by regulation any alleged deficiency he perceives in the law. There can be no doubt that the Secretary's regulation is inconsistent and in conflict with the statute, is a usurpation of the legislative function, and goes far beyond the proper exercise of power to promulgate regulations which bear a reasonable relation to the purpose sought to be achieved by Congress.¹⁶ For a regulation to be proper, the United States Supreme Court in Maryland Casualty Co. v. United States, supra, has pronounced the rule to be as follows (at p. 349):

* * * It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. United States v. Grimaud, 220 U.S. 506; United States v. Birdsall, 233 U.S. 223, 231; United States v. Smull, 236 U.S. 405, 409, 411; United States v. Morehead, 243 U.S. 607. * * *

Moreover, we submit that the power of an executive officer to prescribe

¹⁶ Maryland Casualty Co. v. United States, 251 U.S. 342, 349; United States v. Smull, 236 U.S. 405, 409, 411; Manhattan General Equipment v. Commissioner of Internal Revenue, 297 U.S. 129, 134, 135; Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 69, 70; International Ry Co. v. Davidson, 257 U.S. 506, 514.

regulations does not carry with it the power to make law.¹⁷ In Manhattan General Equipment Co. v. Commissioner of Internal Revenue, *supra*, the Supreme Court said (at pp. 134-135):

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co., 256 U.S. 315, 320-322; Miller v. United States, 294 U.S. 435, 439-440; and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. International Ry. Co. v. Davidson, 257 U.S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable."

In Miller v. United States, *supra*, the Supreme Court said (at pp. 439-440):

"It [the administrative regulation] is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purpose of the Act. It is not, in the sense of the statute, a regulation at all, but legislation. * * * This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purpose of the act--not to amend it. United States v. 200 Barrels of Whiskey, 95 U.S. 571, 576; Morrell v. Jones, 106 U.S. 466, 467; United States v. Grimaud, 220 U.S. 506, 517; Campbell v. Galeno Chemical Co., 281 U.S. 599, 610." (Emphasis added.)

And in United States v. Powell, 95 F.2d 752, 754, the United States Court of Appeals for the Fourth Circuit said (at p. 754):

¹⁷ Manhattan General Equipment Co. v. Commissioner of Internal Revenue, *supra*; Miller v. United States, 294 U.S. 435, 439, 440; United States v. George, 228 U.S. 14, 21; United States v. Grimaud, 220 U.S. 506, 517; United States v. United Verde Copper Co., 196 U.S. 207, 215.

"While it is true that great weight is accorded administrative application and construction of statutory provisions, National Lead Company v. United States, 252 U.S. 140, 40 S.Ct. 237, 64 L.Ed. 496, it is equally true that where the provisions of an act are plain and unambiguous, the governmental department administering the statute has no power to extend or amend it by regulations. The power of an administrative officer to prescribe regulations does not carry with it the power to make law. * * *" (Emphasis added.)

The principles thus enunciated by the United States Supreme Court may be summarized in a few brief sentences. One is that the power of an administrative officer to prescribe regulations does not carry with it the power to make law. The second principle is that where the provision of an act is unambiguous and its direction specific, there is no authority in an administrative officer to amend it by regulation. The third principle is that a regulation to be valid must be reasonable, must be consistent with the law, and must bear a reasonable relation to the purpose sought to be achieved by the law. In the light of these well established legal principles we submit that regulation 43 CFR 192.3(a) is improper, invalid, and a nullity.

While the precise question under consideration has never been expressly decided by this or any other Court, at least two cases have gone a long way towards its resolution here. The case of West, Secretary of the Interior v. U. S. ex rel. Alling, 58 App. D.C. 329, 30 F.2nd 739, 740 (1929), clearly demonstrates the invalidity of an attempt by the Secretary of Interior to enlarge upon the statutory requirements bearing upon the eligibility of a citizen to lease oil and gas lands. In that case, the Secretary appealed from an order of the Supreme Court of the District of Columbia which issued a writ of mandamus to compel the Secretary to reinstate the oil and gas application of Jean Alling and to issue her a permit to prospect for oil and gas upon certain federal lands in California. Appellee Alling's application was drawn first in a simultaneous drawing but her application was denied by the Secretary of Interior upon the sole ground that at the date of the drawing she was not of lawful age to make

a valid application being only 17 years and 10 months old. Calling attention that Section 1 of the Mineral Leasing Act, 41 Stat. 437 (30 U.S.C.A. Sec. 181) provided that "deposits of * * * oil or gas * * * shall be subject to disposition * * * to citizens of the United States," and that no age limit was therein prescribed, the Court held against the Secretary, saying (at p. 740):

"It will be observed that the Act, in section 1 expressly provides for the disposition of oil and gas lands through prospecting permits and subsequent leasing 'to citizens of the United States,' and the power vested in the Secretary to establish rules and regulations for the carrying out of the Act does not imply the power to establish a rule or regulation that will conflict with an express provision of the Act. It follows, we think, that if the applicant sufficiently qualifies as a citizen of the United States, the Secretary is powerless to refuse such applicant a permit, or to make any rule or regulation that interferes with the right of such applicant." (Emphasis ours.)

Similarly, in the case at hand, the Secretary invoked the power to establish a rule or regulation providing that an applicant for a lease is to be charged with the acreage in his application against the statutory limit of 46,080 acres of oil and gas leases authorized in any one State. This regulation does "conflict with an express provision of the Act" and by the Secretary imposing a requirement not authorized by the statute he "interferes with the right of such applicant" within the meaning of the language of the Court in the West case previously quoted.

The case of United States v. George, 228 U.S. 14 (1913), provides even clearer judicial precedent for the view that the Secretary of Interior cannot, by regulation, add requirements to the leasing of oil and gas lands not authorized by the controlling statute. In that case, George, in an effort to perfect his homestead rights, falsely deposed in an affidavit required by a regulation of the Secretary of Interior and was prosecuted for perjury. Sec. 2291 of the controlling statute required a sworn affidavit from only two witnesses and none from the homestead claimant

himself. The perjury conviction was reversed by the United States Supreme Court, the Court stating (at pp. 21-22):

"* * * It is manifest that the [Secretary's] regulation adds a requirement which that section [of the controlling statute] does not * * *. If the Secretary of Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Section 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the Government and given to the discretion of the Land Department. * * *

"In United States v. United Verde Copper Co., supra, this Court considered the power of the Secretary of the Interior under an Act of Congress giving the right to cut timber from the public lands for certain purposes, which were enumerated 'or domestic purposes,' and making the right subject to such rules and regulation as the Secretary of the Interior might prescribe 'for the protection of the timber'. The Secretary made a regulation which provided, among other things, that no timber should be 'permitted to be used for smelting purposes * * *'. The justification urged for the regulation was that the word 'domestic' meant household. This Court rejected the contention and decided that the regulation transcended the power of the Secretary. We said 'if Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation'.

"In that case the power of the Secretary of Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar * * *". (Emphasis ours.)

In the light of the principles enunciated in the West and George cases it is submitted that the Secretary's regulation 43 CFR 192.3 is in violation thereof. The words of the controlling statute here are clear and unambiguous: "No person * * * shall take or hold * * * oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State." (Emphasis added.) The statute

nowhere speaks of nor intimates by any stretch of the imagination that offers or applications are to be charged against the statutory acreage limitation. Yet the Secretary's regulation accomplishes exactly what the Courts in the West and George cases prohibit - the abridgement and enlargement of clear statutory requirements. In effect, the Secretary by his unlawful regulation qualifies and limits the legislative right of applicants for oil and gas leases to hold oil and gas leases granted in the amount of 46,080 acres. In the case at bar the Secretary refused to issue to appellant leases for the land in suit totalling 3,145.63 at a time when appellant concededly held under leases a total of 9,551.57 acres and under pending applications a total of 680 acres on which he had priority and ultimately received leases. The right of appellant to take and hold leases up to a total of 46,080 acres in the State of Wyoming has been improperly and unlawfully qualified or limited by the Secretary's regulation.

Apart from the fact that the Secretary's regulation 43 CFR 192.3(a) is plainly and obviously in conflict with the statute, there is not the slightest justification for rejecting appellant's applications for the land in suit on the ground of "expediency" referred to in the Secretary's decision "to discourage the filing of offers for leases which the Department is prohibited by Section 27 from issuing" (JA 33). This is pure fantasy. The statute authorizes any person to take or hold as much as 46,080 acres of oil and gas leases granted under the Act in any one State. The Secretary concedes that as of the critical date May 23, 1960, appellant had been granted and held a total of 9,551.57 acres in the State of Wyoming. The Secretary also concedes that as of that date appellant had pending five applications containing a total of 3,720 acres as to which he had priority and subsequently was granted leases for only 680 acres. Thus, the most that can be said is that on May 23, 1960, appellant held 9,551.57 acres under lease and had a naked right to receive leases for an additional 680 acres making a total of only 10,231.57 acres - almost 36,000 acres under the maximum authorized by statute. In this light we submit that it is

incredible for the Secretary to reject appellant's applications for the land in suit which embrace a total of 3,145.63 acres on the ground of "expediency in the administration of the Act and to discourage the filing of offers for leases which the Department is prohibited from issuing." If leases are issued for the lands in suit appellant would have a grant total of 13,377.20 acres.¹⁸ By no stretch of the imagination is it possible to see how there could be any overreaching by the appellant in attempting to acquire more acreage under lease than authorized by statute. We submit that it is clear that the Secretary's alleged justification for issuing on January 8, 1959, amendatory regulation 43 CFR 192.3(a) to include applications for leases in the statutory 46,080 acre limitation on oil and gas leases is unauthorized and in direct conflict with the statute.

Contrary to appellee's position in this controversy in the Court below the Secretary prior to the adoption of the amendatory regulation on January 8, 1959, had never expressly provided in a regulation published in the Federal Register that the statutory limitation on oil and gas leases also included applications for leases. For more than 13 years going back to October 28, 1946, when the Secretary approved regulations described as Circular 1624¹⁹ the specific regulation 43 CFR 192.3 here under discussion had uniformly provided in pertinent part, as follows:²⁰

"Sec. 192.3 Acreage Limitations on Leases

"No person, association, or corporation, except as in the act provided, may hold more than 15,360 acres in

¹⁸ This includes 9,551.57 acres in outstanding leases and 680 acres in the applications pending on May 23, 1960, for which appellant had priority and later received leases. Even if the one application dropped by appellant containing 1,920 acres as to which he acquired priority in the drawing of June 7, 1960, is added, the overall total would still be only 15,297.20 acres — well below the statutory limit.

¹⁹ These regulations were published in the Federal Register on November 1, 1946, in Volume 11 at p. 12956.

²⁰ The maximum acreage limitation on oil and gas leases in any one State at that time was 15,360 acres.

any one state, whether directly through the ownership of leases or interests in leases, or indirectly as a member of an association, or associations, or as a stockholder of a corporation, or corporations, holding leases or interests therein or both. * * *

"In computing acreage holdings or control, the accountable acreage of a party owning an undivided interest in a lease shall be such party's proportionate part of the total lease acreage. * * *

"No lease will be issued and no assignment will be approved until it has been shown pursuant to the requirements of Sec. 192.42(b) and (c) that the lessee or assignee is entitled to hold the acreage. Any party found to hold or control accountable acreage computed in accordance with the principles above set forth in excess of the prescribed limitations shall be given thirty days within which to file proof of the reduction of his holdings or control so as to conform with the prescribed limitation." (Emphasis added.)

The above quoted language in almost identical form continued in force and effect until the Secretary's amendatory regulation was adopted on January 8, 1959. For convenience we call the attention of this Honorable Court to Exhibit B to the complaint (JA 19) which contains the regulation 43 CFR 192.3 in force and effect just prior to the adoption of the amendatory regulation and as it read almost verbatim for 13 years prior thereto. It will be noted that over the entire 13 year period the specific regulation, Sec. 192.3, dealing with acreage limitations was completely silent and did not include applications as accountable acreage under the statutory limitation. Only leases were computed as accountable acreage. Furthermore, as will be noted in the last paragraph quoted above, even where a party was found to hold or control accountable lease acreage in excess of the prescribed limitation he was given a grace period of 30 days, without penalty of any kind, within which to file proof of the reduction of his holdings or control so as to conform with the prescribed limitation.

We submit that all the Secretary has shown in tracing the history of the regulations from 1926 to the present date²¹ is that the Secretary

²¹ Appellee's Memorandum of Points and Authorities, pp. 3-5(a), in the Court below.

has required those filing applications for leases to submit a showing as to the interests held in permits, leases and applications therefor. This is entirely proper because the Secretary has a right to know whether there has been overreaching or non-observance, or the possibility thereof, by anyone of the acreage limitation provisions of the Act. What the Secretary has carefully avoided stating in tracing the history of the regulations is that nowhere in the Secretary's regulations is there the slightest indication that acreage in an application is accountable acreage under the statutory limitation. On the contrary, the regulation Sec. 192.3 in force and effect for 13 years does not even mention the word "application". It speaks only of leases and the manner of computing accountable acreage depending upon whether the lease interest is held directly or indirectly. Not only was there no such provision in the regulations charging acreage in applications against the statutory limitation on oil and gas leases but the regulation governing holdings of leases even allowed a grace period of 30 days for the reduction of holdings where it was found that excess lease acreage was being held.

We submit that the principle is well established that a long and continued practice of an executive department known to and acquiesced by the Congress has the force and effect of law.²² From 1946 to 1959 the published regulation of the Secretary's Department of the Interior, 43 CFR 192.3, prescribed acreage limitations on oil and gas leases in conformity with the statute. Not one word in this regulation which stood for at least 13 years gave even the slightest inkling that applications were to be included in computing the statutory acreage limitation. It is significant that even the latest amendment of Section 27 of the Mineral Leasing Act by the Act of September 2, 1960 (30 U.S.C., 1958 ed., Supp. IV, 184(d)), which increased the acreage limitation in any one State to

²² United States v. American Trucking Associations, 310 U.S. 534, 549; Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315; Alaska S.S. Co. v. United States, 290 U.S. 256, 262; United States v. Midwest Oil Company, 236 U.S. 459, 472-4.

246,080 acres speaks only in terms of oil and gas leases - not applications. We submit it is clear that the Secretary's amendatory regulation of January 8, 1959, constitutes an attempt to make law rather than to administer the statute as enacted by Congress and, therefore, is invalid and a nullity.

II

The Secretary's Regulation 43 CFR 192.3(e)(2) Is Unreasonable, Unauthorized and in Violation Of the Statute.

43 CFR 192.3(e)(2) provides that (JA 16):

"If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety." (Emphasis added.)

As indicated earlier in this brief the Secretary concedes that as of May 23, 1960, appellant was granted and held in the State of Wyoming a total of 9,551.57 acres of oil and gas leases - well below the 46,080 acres authorized by statute. The Secretary also concedes that on the same date there were pending five applications of appellant for a total of 3,720 acres. Of these applications appellant was the first qualified applicant and entitled to priority only as to 680 acres and leases therefor were later issued to him.²³ As to the remaining 3,040 acres appellant was not the first qualified applicant and leases were issued to other parties. Yet, without regard to whether or not appellant was the first qualified applicant and entitled to priority the Secretary invoked the

²³ This, too, is conceded by appellee. See in the Court below his Memorandum of Points and Authorities, at p. 2.

above quoted regulation Sec. 192.3(e)(2) and held that appellant was chargeable as of May 23, 1960, with the full 3,720 acres in the five pending applications against the statutory 46,080 acre limitation. When appellant filed on May 23, 1960, 30 applications covering a total of 35,614.10 acres they were found to be simultaneous with a large number of applications filed by other parties for the same land and were included in a drawing held on June 7, 1960, to determine the successful applicants entitled to priority who would then automatically become the first qualified applicants entitled to leases pursuant to 30 U.S.C., 1958 ed., sec. 226 which provides that

* * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

When the drawing was concluded appellant was successful and had acquired priority as to a total of 5,065.63 acres and was unsuccessful as to the remaining 30,548.47 acres. Nevertheless, the Secretary's Department of the Interior invoked the above quoted regulation Sec. 192.3 (e)(2) and held that since the 35,614.10 acres in the 30 applications filed on May 23, 1960, caused appellant to exceed the statutory 46,080 acre limitation by 2,805.67 acres²⁴ his successful applications as to 5,065.63 acres were subject to rejection in their entirety.

We submit that the Secretary's regulation 43 CFR 192.3(e)(2) is improper, unauthorized and in conflict with the statute, 30 U.S.C., 1958 ed., sec. 184, and provides no basis in law for rejecting the five successful applications in the drawing and for attempting to charge appellant with acreage embraced in applications for leases as to which he

²⁴ The Secretary added 9,551.57 acres of leases with 3,720 acres of applications pending on May 23, 1960, and 35,614.10 acres filed on May 23, 1960, to arrive at a total of 48,885.67 acres - 2,805.67 acres above the statutory limit of 46,080 acres of oil and gas leases. The Secretary simply ignored the fact that the statutory 46,080 acre limitation applied only to oil and gas leases - not ap-
plications.

was not the first qualified applicant entitled to priority.²⁵ In the first place, an application which is included in a drawing with other simultaneous applications has no rights of any kind until the drawing is held and priorities are determined. This is governed by the Secretary's regulation 43 CFR 192.43(d)²⁶ which provides that in case of simultaneous applications for the same land their priorities will be determined by a public drawing. In this posture of simultaneous applications in which no one applicant has rights of any kind to a lease until the drawing is held and priorities are determined it is unconscionable, we submit, for the Secretary to rule that each such applicant is chargeable with acreage under the statutory 46,080 acre limitation.

In the second place, after a drawing is held and priorities are determined only the application which is drawn No. 1, if otherwise qualified, is entitled to a lease pursuant to Section 17 of the Mineral Leasing Act (30 U.S.C. 226) previously quoted. We submit that only the successful applicant drawn No. 1 in the drawing may properly be charged with acreage against the statutory limitation once the lease is issued. Conversely, the unsuccessful applicants in the drawing not having acquired any priority to a lease cannot properly and lawfully be charged with acreage they are not entitled to receive. The Department itself has reiterated time and again in numerous decisions the well established rule in referring to Section 17 of the Mineral Leasing Act that

"This provision of law is mandatory in nature. If the Secretary (or his delegate) decides, in his discretion, to lease such land for oil and gas development, he is required by this statutory directive to lease it to the first

²⁵ It is appellant's position that the Secretary has no authority prior to the issuance of a lease to charge acreage embraced in an application against the statutory acreage limitation on oil and gas leases. For sake of argument only we suggest that at most the Secretary may compute the acreage embraced in applications against the statutory limit as to which a person is the first qualified applicant and entitled to priority to receive such leases. Although this violates the letter of the law, it does not appear to violate the spirit of the law.

²⁶ Exhibit C to the complaint (JA 22).

qualified person making a proper application for the lease. Bettie H. Reid et ano., A-26330 (February 4, 1952) 61 I.D. 1; John F. Deeds et ano., A-26287 (June 26, 1952)."²⁷

The Secretary cannot in good conscience say in one breath that his Department is under a mandatory duty to issue a lease to the first qualified person and in the next breath say that those who are not entitled under the law to a lease are nevertheless chargeable with the acreage encompassed by their applications.

In the third place, following a drawing of simultaneous applications not even the applicant drawn No. 1, albeit fully qualified, has any assurance that a lease will be issued to him. The Secretary has held and he has been sustained by the United States Court of Appeals for the District of Columbia²⁸ that the first qualified person making application for a lease who is qualified shall be entitled to a lease if the Secretary in his discretion decides to lease such land for oil and gas development. On numerous occasions the Secretary has withdrawn public domain lands from oil and gas leasing for the use of other agencies of Government and such withdrawal has operated to defeat the right of the first qualified applicant to a lease. In these circumstances it is inconceivable that the Secretary should nevertheless insist that prior to the issuance of a lease to the successful applicant in a drawing such applicant is chargeable with the acreage encompassed by his application. It is even more inconceivable that in the same circumstances the Secretary should insist that even the unsuccessful applicants in a drawing are chargeable with the acreage in their applications notwithstanding that they have no priority to a lease.

We submit it is plain that the Secretary is clearly wrong and that by his regulation 43 CFR 192.3(e)(2) he is attempting to make law rather

²⁷ Transco Gas & Oil Corp. et al., 61 I.D. 85, 87 (1952). See also John Snyder et al., A-27035 (February 11, 1955); J. L. Dougan et al., A-26774 (September 1, 1954); McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F. 2nd 35 (1955).

²⁸ Haley v. Seaton, 108 U.S. App. D.C. 257, 281 F. 2nd 620 (1960).

than to administer the statute as enacted by the Congress. One further comment on this subject appears necessary. The regulation (JA 16) refers to "any person holding or controlling leases * * * or applications"; the decision of the Director, Bureau of Land Management (JA 29) contains the statement "an offeror [applicant] controls acreage, and is chargeable for it"; while the Secretary's decision (JA 33) points as the reason for the regulation "to discourage the filing of offers for leases which the Department is prohibited by section 27 from issuing". These quotations suggest that the basis for the chargeability of the acreage is the element of control exercised by appellant over the acreage applied for in his applications. As we have shown above the position of the Department is manifestly specious. Neither before the drawing nor after the drawing did appellant have the slightest control over the acreage except with respect to those applications as to which he acquired first priority in the drawing and became the first qualified applicant entitled to leases. It follows that with respect to the five applications pending on May 23, 1960, covering a total of 3,720 acres (JA 21) appellant had priority and was entitled to receive and did actually receive leases for only a total of 680 acres. The remaining 3,040 acres were leased to other parties and it is unfair, improper and unjust for the Secretary to attempt to charge appellant with this acreage as to which he had no priority and no control and was not entitled to leases under the law as of May 23, 1960.

Similarly as to the 35,614.10 acres which appellant filed in 30 applications on May 23, 1960, and which were simultaneous with a large number of applications filed by other parties for the same land, it was improper and in violation of the acreage limitation provision of the statute (30 U.S.C. 184) for the Secretary to charge appellant with this acreage against the 46,080 acre limitation on oil and gas leases. Before the drawing appellant had no priority, no control, and no rights of any kind to receive leases. After the drawing appellant was successful and acquired priority as to five applications for a total of 5,065.62 acres

including the land in suit. With respect to the remaining 30,548.46 acres appellant following the drawing had no priority, no control, and was not entitled to leases under the law. There is no proper basis, therefore, for charging appellant with 30,548.46 acres.

III

The Secretary's Position in the Court Below Is Untenable and the Cases Cited in Support Thereof Are Inapposite.

Before concluding this argument we deem it proper to make appropriate comment on the position taken by the Secretary in the Court below. At page 5a of his points and authorities in support of his motion for summary judgment the Secretary calls attention to the rules and regulations providing that acreage in pending applications be reported in connection with determining the amount of acreage chargeable to any particular individual. Actually an applicant for a lease was not required by the regulations in force and effect on May 23, 1960, or now to report the exact amount of acreage he has when filing an application. 43 CFR 192.42(e)(3)(ii)²⁹ merely requires an applicant to state in each application filed for a lease whether his direct and indirect interests in oil and gas leases, applications and offers exceed 46,080 chargeable acres in the same State. The meaning of the words "chargeable acres" in this regulation is, however, a matter of differing interpretation as between the Secretary and appellant. The Secretary now says that all applications filed by appellant, whether or not he is the applicant first making application who is entitled to priority to a lease, are to be reported as chargeable against the State 46,080 acre limitation on leases. If that is the Secretary's position what then was the purpose or significance of the words "chargeable acres" in the regulation? With all due respect to the Secretary there can be no doubt that these words were

²⁹ Circular 2009 approved January 8, 1959. See Exhibit A to the complaint (JA 17).

intended to refer to acreage chargeable under the statute, that is, leases and not applications for leases.

In the Court below, the Secretary cited two published departmental decisions – John H. Trigg, 60 I.D. 166, and Albert C. Massa, 62 I.D. 339, as supporting the acreage reporting requirement of the regulation the reason for which is stated as "the Department cannot very well entertain applications which it is specifically prohibited by law from granting." Both decisions, however, are not pertinent here. In the Trigg case the acreage limitation on leases at that time was 7,680 acres in one State. He filed an application to lease additional land³⁰ when he already held a total of 8,987.88 acres under an outstanding lease and pending applications as to which he had priority and was the first qualified applicant entitled to leases. In these circumstances, the Department could not properly entertain Trigg's application favorably. In the case at bar, appellant held on May 23, 1960, a total of 9,551.57 acres under outstanding leases and had priority to lease a total of 680 acres out of 3,720 acres in pending applications. This was conceded by the Secretary in the Court below.³¹ At most, therefore, appellant was chargeable for 10,231.57 acres – exactly 35,848.43 acres under the statutory limit of 46,080 acres. When appellant filed on May 23, 1960, 30 applications embracing 35,614.10 acres which were included with other simultaneous applications for the same land in a drawing, he had no priority and no control over the acreage. Contrary to the Secretary's position the Department was not then entertaining "applications which it is specifically prohibited by law from granting" as was the situation in the Trigg case.

The case of Albert C. Massa, *supra*, is even less in point. There the acreage limitation at the time was 15,360 acres in one State. Massa

³⁰ The additional land was in an outstanding lease held by a third party and even if Trigg held acreage below the statutory limit his application would have been rejected because the land was not available for lease.

³¹ Answer, Par. VIII; Memorandum of Points and Authorities, p. 2.

filed an appeal to the Secretary challenging the right of the Department to issue leases to one Lewis H. Larsen on the ground that Larsen held acreage in excess of the statutory limit. Larsen had been advised by the Bureau of Land Management when he filed his applications that he may be exceeding the acreage limitations. He was allowed a grace period of 30 days, as then authorized by regulation 43 CFR 192.3, within which to reduce his acreage holdings without the loss of priority of his applications. The only question involved in the appeal was whether Larsen had effectively divested himself of the excess acreage within the 30 day grace period. This has no bearing on the case at bar. In the Court below the Secretary relied on Safarik v. Udall, 113 U.S. App. D.C. 68, 304 F. 2nd 944, 950 (1962), for the rule that (at p. 74):

"It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong. McKenna v. Seaton, App. D.C., 259 F.2d 780, 784, c.d. 358 U.S. 835." (Emphasis added.)

We agree that in carrying out his functions in the administration and management of the public lands the Secretary must be accorded a wide area of discretion but we submit that a wide area of discretion does not include the right to amend an act of Congress and make law rather than to administer the statute as enacted by Congress under proper regulations. As the United States Court of Appeals for the District of Columbia stated in Seaton v. Texas Company, 103 U.S. App. D.C. 163, 256 F. 2nd 718 (1958), at p. 167:

"There is wide latitude available to the Secretary in many situations, but he is bound by the statute * * *" (Emphasis added.)

Moreover, we submit that the Secretary's regulations 43 CFR 192.3(a) and 192.3(e)(2) which attempt to include the acreage in applications for leases as chargeable against the statutory acreage limitation of 46,080

acres of oil and gas leases are inconsistent with and in violation of the statute. We state categorically that the Secretary is clearly wrong thus requiring this Honorable Court to repudiate and overrule the Secretary's action in rejecting appellant's applications for leases for the land in suit.³² In McKenna v. Seaton, supra, the Court said (at p. 54):

"* * * But a fair common denominator, as it were of the conditions which will cause judicial repudiation of administrative action by the Secretary, is at least that he is plainly wrong. Lane v. Hoglund, 244 U.S. 174, 37 S.Ct. 558, 61 L.Ed. 1066; Chapman v. Santa Fe Pac. R. Co., 90 U.S. App. D.C. 34, 198 F.2d 498. * * *"

IV

The Secretary Has No Regulation Which Provides That After a Drawing Is Held Unsuccessful Applications Continue to Be Chargeable Against the Statutory Acreage Limitation of 46,080 Acres Until the Applications Are Withdrawn.

As we have pointed out earlier in this brief it is unfair, improper and in violation of the statute for the Secretary to charge appellant with acreage in applications included in a drawing as to which he was unsuccessful and acquired no priority to a lease. No regulation has been issued by the Secretary expressly putting appellant and the public on notice that following a drawing unsuccessful applicants continue to be chargeable with the acreage encompassed by their unsuccessful applications. The Secretary's 1959 amendatory regulation 43 CFR 192.3 is completely silent about this nor is there any other regulation to put appellant and the public on notice. In fact the procedure established by the Secretary's Bureau of Land Management had the effect of lulling appellant and the public into a false sense of security. Following each drawing appellant

³² McKenna v. Seaton, 104 U.S. App. D.C. 50, 259 F. 2nd 780 (1958), certiorari denied 358 U.S. 835; McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F. 2nd 35 (1955).

received from the Cheyenne land office a notice with respect to each of his unsuccessful applications as follows:

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Land Office
P. O. Box 929
Cheyenne, Wyoming

DECISION

Oil and Gas

OFFER REJECTED - ADVANCE RENTAL RETURNED

At the public drawing held on the date shown above, your offer was not the first one drawn for the lands involved.

Accordingly your offer is rejected and the advance rental payment is returned herewith. The offer may be reinstated in the event the lands are not leased to an offeror having a higher priority in the drawing. Reinstatement will be subject to repayment of the advance rental and full compliance with other filing requirements after due notice to the offeror. (Emphasis added.)

Manager

When appellant received these decisions on his unsuccessful applications there was nothing further to be done. His applications had been rejected and the rentals returned. The decisions could easily have warned appellant that the Bureau of Land Management would continue to charge him with the acreage in his rejected applications unless withdrawn but no such warning was given. In these circumstances to charge appellant with this acreage is unconscionable. We submit there is no justification in law or in equity for rejecting appellant's applications as to the land in suit. The Secretary's Department of the Interior has itself established the equitable principle in the case of Donald C. Ingersoll, 63 I.D. 397 (1956), as follows (at p. 400):

"The Department has recently held that when an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be spelled out so

clearly that there is no basis for disregarding his non-compliance. *Madison Oils, Inc.*, T. F. Hodge, 62 I.D. 478 (1955); *M. A. Machris*, Melvin A. Brown, 63 I.D. 161 (1956). That holding is clearly applicable to the present situation."

This equitable principle is clearly applicable to the case at bar. Yet the Secretary arbitrarily refused to consider applying the equitable principle here.³³

CONCLUSION

It is submitted that we have demonstrated conclusively in this brief that the Secretary's regulation 43 CFR 192.3 approved January 8, 1959, is unauthorized and illegal as being in conflict with the controlling provision of the Mineral Leasing Act governing acreage limitations on holding oil and gas leases. Moreover, the Secretary's action in rejecting appellant's applications for the land in suit in the circumstances herein presented is arbitrary, unreasonable and capricious. The Secretary was plainly wrong and his action is subject to judicial repudiation as in *McKenna v. Seaton*, *supra*.

The judgment below should be reversed with instructions to grant plaintiff's cross-motion for summary judgment, to deny defendant's motion for summary judgment, and to grant the relief requested in the complaint.

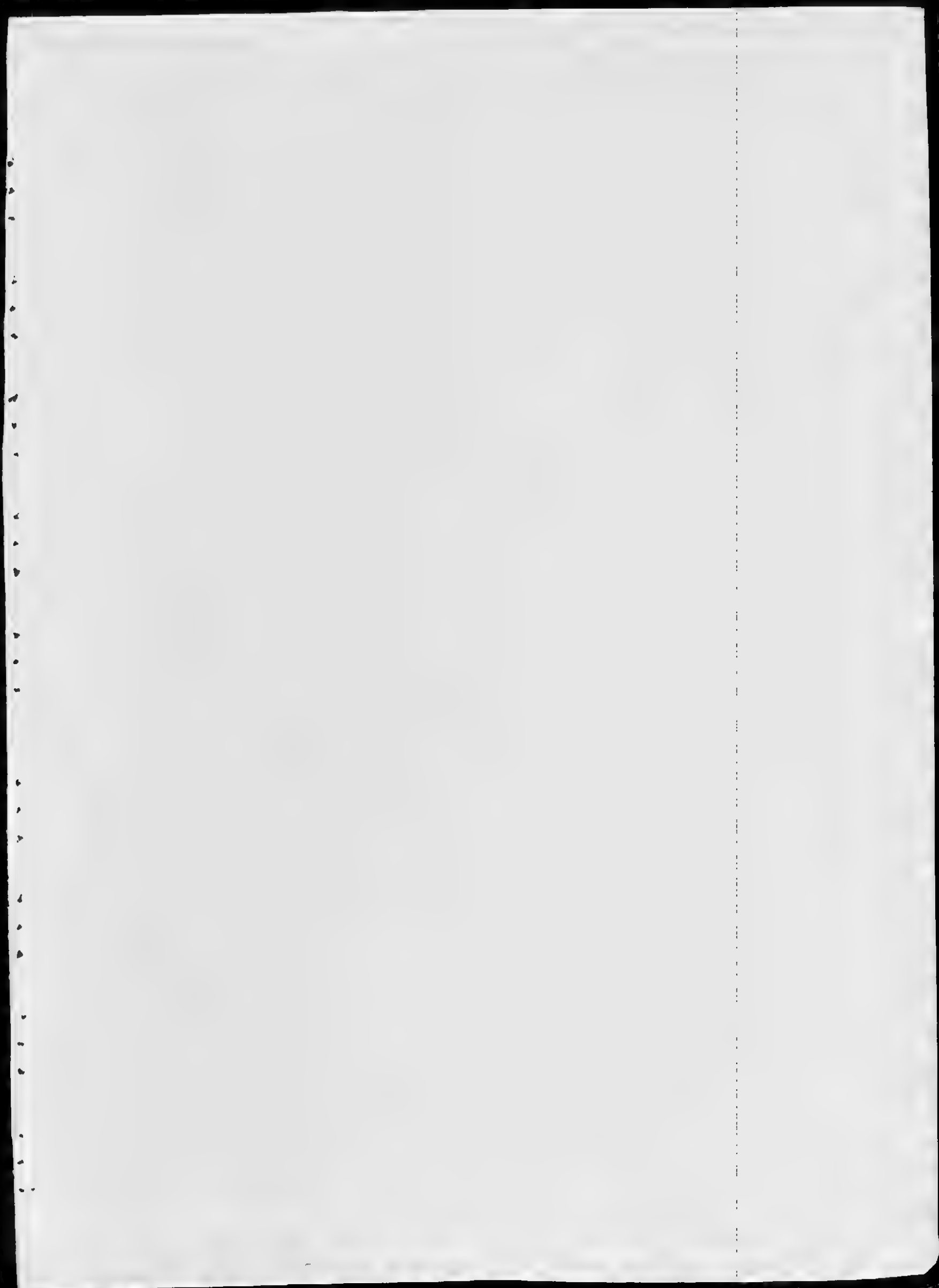
Respectfully submitted,

MAX BARASH

711 - 14th Street, N.W.
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Attorney For Appellant

³³ See Exhibits I and J to the complaint (JA 37, 38).



**BRIEF FOR STEWART L. UDALL, SECRETARY
OF THE INTERIOR, APPELLEE**

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 18,274

MELVIN A. BROWN, APPELLANT

v.

STEWART L. UDALL, Secretary of the Interior, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

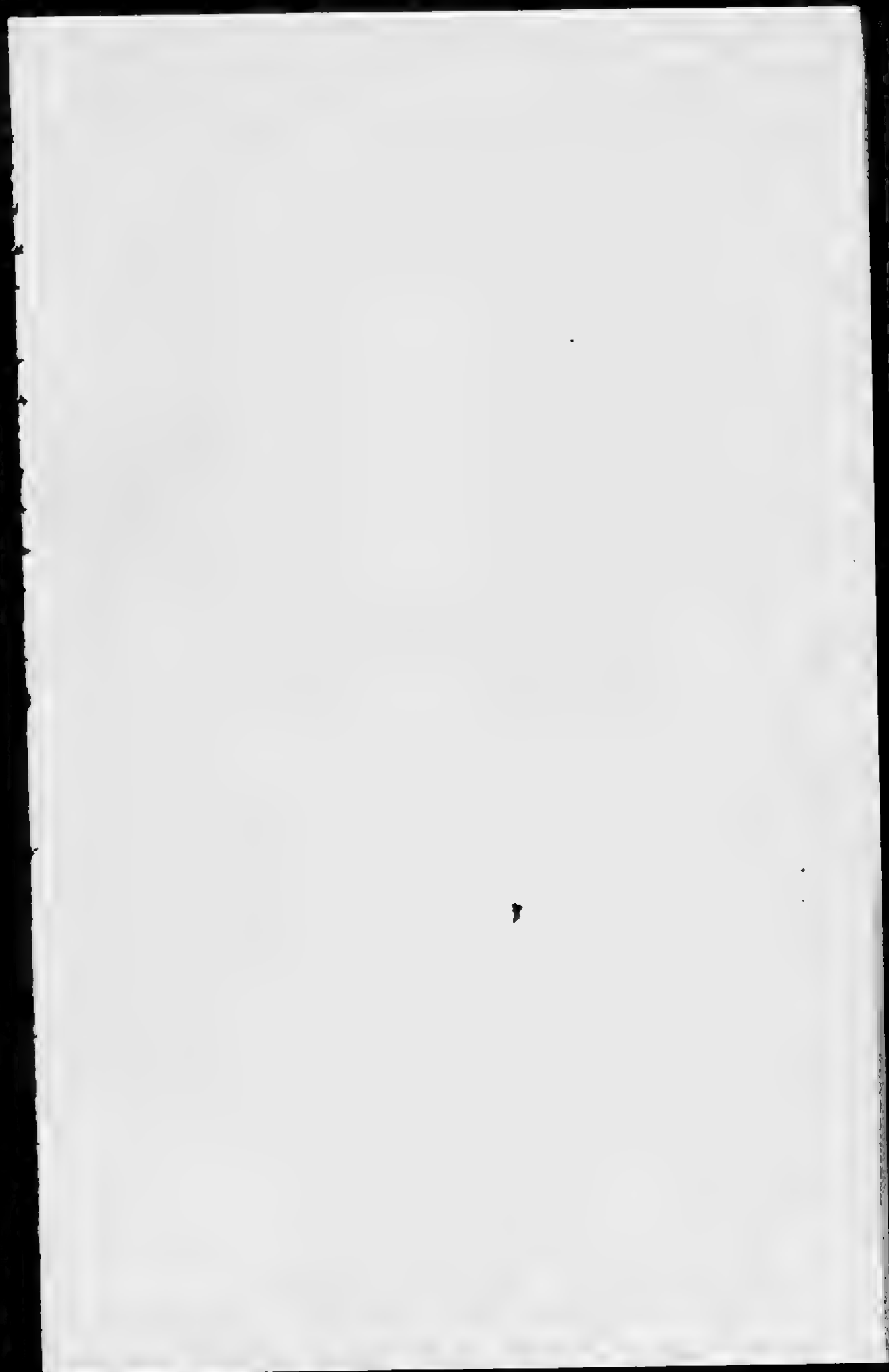
United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 6 1964

Nathan J. Paulson
CLERK

RAMSEY CLARK,
Assistant Attorney General.

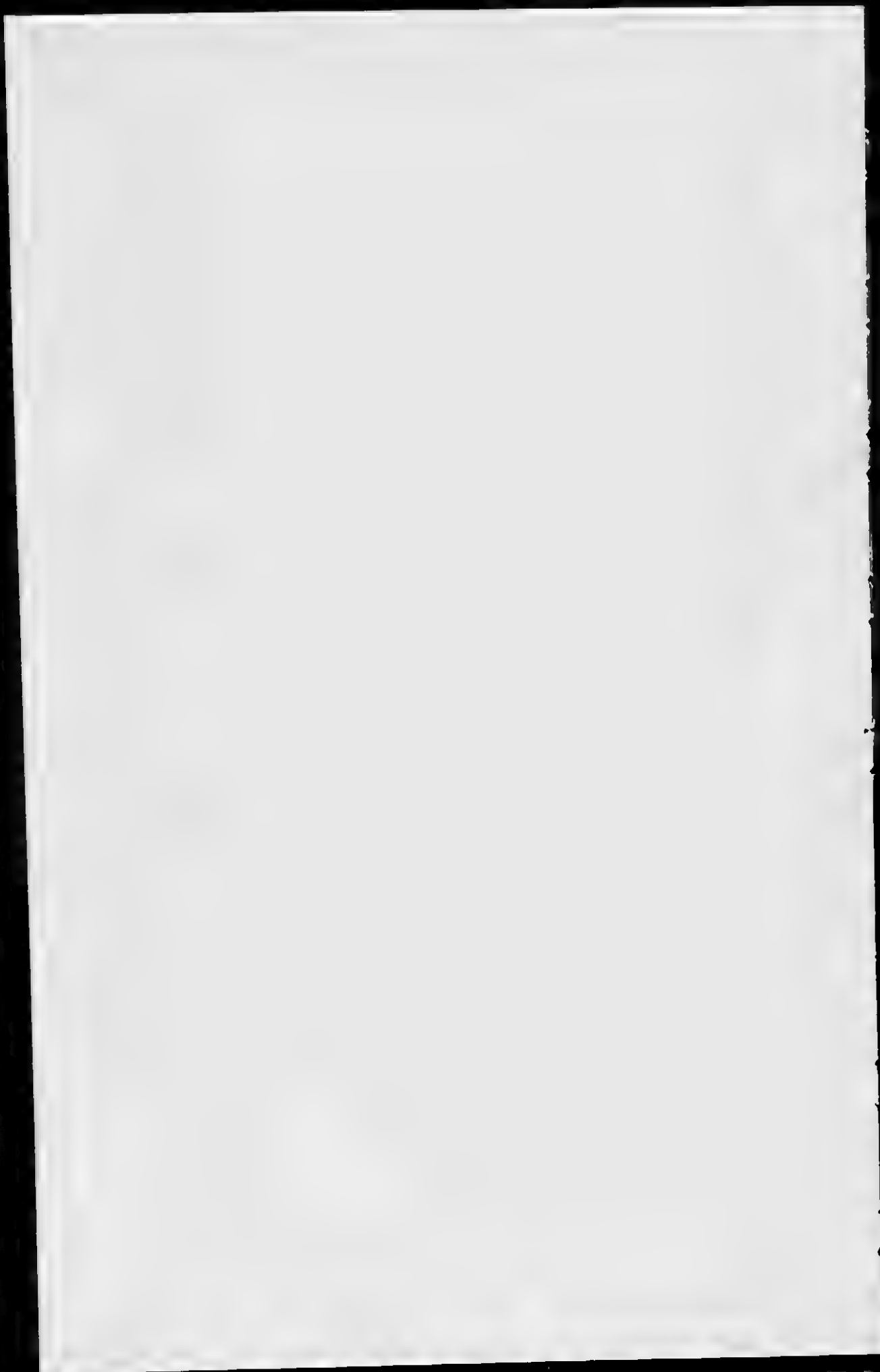
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QUESTIONS PRESENTED

1. Whether the Secretary of the Interior may implement the Mineral Leasing Act, which limits the total acreage that an individual can lease for oil and gas purposes in a single state, by a regulation providing that applications in excess of the limit will be rejected and, if so,

2. Whether the regulation is valid as applied to appellant's applications.



III

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,274

MELVIN A. BROWN, APPELLANT

v.

STEWART L. UDALL, Secretary of the Interior, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

**BRIEF FOR STEWART L. UDALL, SECRETARY
OF THE INTERIOR, APPELLEE**

OPINION BELOW

The district court did not write an opinion. Its oral opinion is set out at pages 46-47 of the Joint Appendix.

JURISDICTION

Jurisdiction of the district court was invoked under Title 11, section 306, of the District of Columbia Code; Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C., sec. 1009; and the Declaratory Judgments Act, 28 U.S.C., secs. 2201 and 2202 (JA 2). Summary

judgment dismissing the complaint was entered on September 17, 1963 (JA 47). Notice of appeal was filed November 6, 1963 (JA 48). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

STATEMENT

Summary.—Congress has provided in the Mineral Leasing Act of 1920, as amended, that no single individual may hold oil and gas leases covering more than a specified number of acres (46,080 acres at the time involved in this suit) in any one state. In administering the Act, the Secretary of the Interior has provided by regulation that the amount of land involved in pending applications, as well as land in executed leases, will be counted as chargeable acreage in computing an individual's holdings. Appellant challenges that method of administering the Act and, particularly, the rejection of his applications to lease 3,145.63 acres, which were drawn number one in a drawing to determine priority among simultaneous filings. The rejection was on the ground that he was chargeable with the acreage in applications that were not drawn number one in that drawing until such time as those applications had been withdrawn. That rejection by the Manager of the Cheyenne, Wyoming, Land Office (JA 24, 26) was affirmed by the Director of the Bureau of Land Management (JA 27-30) and the latter's decision, in turn, was affirmed by the Secretary of the Interior (JA 31-36). The decision of the Secretary was sustained by the district court (JA 46-47). The details are as follows:

The Facts.—As it existed between 1954 and 1961, Section 27 of the Mineral Leasing Act of 1920, 41 Stat. 448, as amended, 30 U.S.C. (1958 ed.) sec. 184, read as follows:

* * * No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder

in any one State * * *. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of said sections, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General.

Section 32 of that Act further provided (41 Stat. 450, 30 U.S.C. sec. 189):

The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, * * *.

At the time pertinent here and expressly pursuant to the authority given him to administer the Act by the latter Section, the Secretary of the Interior had provided by regulation, 43 C.F.R. (1960 Supp.), sec. 192.3(a); 24 Fed. Reg. 281-282 (January 13, 1959), as follows:

No person * * * may hold more than 46,080 acres in any one State * * * *whether directly through the ownership of leases or interests in leases and applications, or offers therefor* or indirectly as a member of an association or associations, or as a stockholder of a corporation or corporations, holding leases or interests therein and applications or offers therefor. * * *¹

He further provided, *ibid.*, sec. 192.3(e) (2):

If any person holding or controlling leases or interests in leases only, *or applications or offers for leases only, or both leases or interest in leases and applications or offers*, below the acreage limitation provided in this section, files an application or offer,

¹ Emphasis has been added throughout this brief unless otherwise indicated.

or group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, *will be rejected in its entirety.*

The parties are in agreement as to the following facts (JA 44, 46). As of March 1, 1960, the appellant held in the public domain in the State of Wyoming oil and gas leases totalling 9,551.57 acres. On February 17, 1960, March 22, 1960, and on various dates in April 1960, appellant filed applications for public domain oil and gas leases in Wyoming totalling an additional 3,720 acres, giving him a grand total in leases and applications of 13,271.57 acres. Early in May 1960, a drawing was held involving, among other lands, the 3,720 acres in appellant's lease applications. Appellant drew number one as to 680 acres of that total and was subsequently issued a lease covering those 680 acres. Although not drawing number one as to the remaining 3,040 acres in his applications, appellant did not withdraw his applications. As of May 23, 1960—the decisive date here—no action had been taken to issue leases to anyone as to those 3,040 acres. Thus, on that date, appellant continued to have pending a total of 13,271.57 acres in leases and applications.

With this situation as to acreage, appellant, on May 23, 1960, filed applications for an additional 35,614.10 acres. In a drawing involving these lands held shortly thereafter, appellant drew number one with respect to a total of 5,065.63 acres.²

The Administrative Rulings.—The Manager of the Cheyenne Land Office on August 15, 1960, rejected appel-

² Of these, only 3,145.63 acres are listed in Appendix A to appellant's complaint as the subject matter of the present litigation (JA 15) because appellant states (Br. 7) that he elected to drop 1,920 acres of the 5,065.63 acres drawn number one, at some time after the drawing.

lant's applications as to these 5,065.63 acres because, on the date they were filed, appellant was over acreage to wit: 9,551.57 acres in leases, 3,720 acres in unwithdrawn applications filed before May 23, 1960, and 35,614.10 in applications filed simultaneously on May 23, 1960, or a total of 48,885.67 acres—against a maximum allowable of 46,080 acres. In rejecting the applications, the Manager pointed out that, pursuant to the provisions of 43 C.F.R. sec. 192.3(e) (2), an application or group of applications which caused an applicant to exceed the acreage limitation must be rejected (JA 24, 26).

The Director of the Bureau of Land Management on March 14, 1961, affirmed the decision of the Manager (JA 27-30). He stated that the law (30 U.S.C. (1958 ed.) sec. 184) "provides for the taking or holding or *control* under the acreage limitation provisions of the Act" and that departmental regulation 43 C.F.R. 192.3(e) (2) provides for rejection of applications or offers by any person "holding or *controlling*" leases or interests in leases or applications or offers which cause him to exceed the acreage limitation (emphasis by the Director). He said that the regulation was "In consonance with the law" because "An offeror controls acreage, and is chargeable for it, until he withdraws his offer or until the offers are rejected by a land office decision. * * * An offeror may eliminate or reduce his chargeable acreage at his own discretion by withdrawing the unsuccessful offers at any time before a lease issues."

On further appeal by Mr. Brown, the Secretary of the Interior on August 31, 1962, affirmed the Director (JA 31-36). He held that "The Department determined many years ago that in the interest of expediency in the administration of the Act and to discourage the filing of offers for leases which the Department is prohibited by Section 27 from issuing, the limitation imposed by the statute on acreage held under lease should be applied administratively to the acreage included in offers for such leases." He further said (JA 33-36):

It is a means of according fair treatment to all applicants and insuring that the provisions of section 27 will not be violated. If no limitation were imposed on the acreage that could be included in offers, any person could file for far more acreage than he could receive in his leases and then pick and choose what acreage he wanted as his offers were reached for processing. This would enable him to tie up vast acreages of land which he could not possibly hold in his leases and to bargain, for a price, with junior offerors anxious to lease some of the acreage tied up by him. Speculation would be promoted, without any benefits to the public interest in promoting the development of public land. In addition, a staggering administrative burden would be cast upon the Bureau in having to accept, record, and act upon countless offers which were filed with full knowledge that only a portion of them could eventuate into leases. In view of these considerations I have no doubt that the regulation attacked by appellant is a reasonable regulation well within the authority of the Secretary in the administration of the act.

* * * *

He contends that because certain of his offers did not draw top priority in previous drawings they are not chargeable to his acreage account. The answer is that he is still maintaining those offers and cannot at the same time urge that they be disregarded. Those offers are, in effect, junior offers which may ripen into leases should the offers which drew higher priority, for some reason, not qualify.

* * * *

In his argument Brown speaks of his offers which were drawn No. 2 and No. 3 in drawings held prior to May 23, 1960 as "unsuccessful" and as giving him "no lease priority." From this it is evident that Brown misconstrues the regulation (43 C.F.R., 1960 Supp., 192.43) under which his offers were simultaneously filed. That regulation, along with another mentioned therein (43 C.F.R. 295.8), simply establishes the order in which offers simultaneously filed

will be considered. The priority list, made up as the result of a drawing, merely assures that the offers will be considered in the same order as that in which they are drawn. It does not bar an offer not drawing first priority from consideration but merely postpones the consideration until offers ahead of it on the priority list are disposed of. *Henry S. Morgan*, A-28688 (August 30, 1961). Thus offers which draw top priority in a drawing may be termed "successful" and as having "lease priority" only in the event the applicants are qualified to hold a lease.

* * * *

Brown contends that the recently adopted system of posting available acreage on the third Monday of each month and providing for the simultaneous filing of offers for such lands is confusing because sometimes the results of the previous month's drawings are not known before the available lands to be included in the following month's drawings are posted.

We see no reason why confusion should result from this method of making lands available for leasing. An offeror knows, or certainly should know, how much acreage he applied for out of what may have been available in the previous month and he knows that that acreage is chargeable to his acreage account so long as he is maintaining those offers. He may at any time withdraw his previous offers but while he is maintaining them, whether before or after a drawing, he is chargeable with the acreage included therein. Cf. *Edwin G. Gibbs*, 68 I.D. 325 (1961). Thus it should not be difficult for him to compute the acreage with which he is chargeable. He need only to total the acreage included in his outstanding offers. On the other hand, as pointed out earlier, if he were to be charged only with respect to acreage as to which his offers had first priority, he would indeed have great difficulty in determining his chargeability on any given date because it would be affected by action taken on prior offers filed by others as to which he had no notice.

The Decision of the District Court.—On October 26, 1962, appellant filed the present suit against the Secretary for reinstatement of his applications on the ground that the Mineral Leasing Act did not authorize inclusion of applications to lease in computing the maximum lease-acreage limitation for an individual (JA 2-14). Motions for summary judgment were filed by both parties (JA 43, 45). The district court denied appellant's motion, granted the Secretary's motion and entered judgment on September 17, 1963, dismissing the complaint (JA 47). The court's reasons, as stated in an oral opinion (JA 47), were that "the regulation is a valid implementation of the statute. It does not transcend the statute but is merely a means of facilitating its administration in situations which otherwise might be difficult or confusing. * * * the Secretary did not misapply the statute in the situation involved in this case." This appeal followed (JA 48).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 27 and 32 of the Mineral Leasing Act of 1920, 41 Stat. 448, as amended, 30 U.S.C. (1958 ed.), secs. 184 and 189, and the Secretary of the Interior's regulations thereunder, 43 C.F.R. (1960 Supp.), secs. 192.3(a) and 192.3(e)(2), are set out in the Statement, *supra*, pp. 2-4.

SUMMARY OF ARGUMENT

I

The Secretary has not usurped the legislative function by his regulations. The statute does not require the Secretary to entertain applications of an individual to lease lands in quantities beyond the statutory limit. Applications to lease are an aspect of the leasing process and authority to control the leases is authority to control an integral part of the leasing process. It is perfectly lawful

and reasonable for the Secretary to refuse to entertain applications for acreages which, if granted, would exceed the statutory limitation for an individual. Since the filing of applications is not a game, it must be assumed that every applicant seriously intends that his lease application will ripen into a lease. Appellant is asserting "a right" to apply for leases on acreage exceeding the statutory limitation which the statute does not give him. The history of public domain oil and gas leasing shows that the concept employed by the Secretary here has been a part of the program from the beginning.

II

Appellant contends that an applicant has no "control" over the acreage applied for in his applications and hence that it should not be chargeable acreage. But after the drawing he did not withdraw his offers and hence he did not waive his right to insist on a lease as "a mandatory duty" of the Secretary, if he were drawn number two and number one failed to qualify. Thus, he eliminates for the present purpose any substance to a priority less than number one, but he still refuses to say that he would not insist on substance to such a priority to secure a lease if the facts develop to justify it.

Appellant supplies no reason why the burden should not be on him and the thousands of other applicants, rather than on the Interior Department, to sort out and remove offers which they might believe have no chance to ripen into leases. The local land office manager cannot be certain that an applicant will not attempt to enforce any unwithdrawn offer. As this Court knows, rulings on the status of existing applications are challenged all through the appeal process in the Department and many times in the courts.

ARGUMENT

Introductory.—We believe that the decisions of the Director of the Bureau of Land Management (JA 27-30) and the Secretary of the Interior (JA 31-36) supply the

full and correct answer to appellant's contentions. We adopt the reasoning of those decisions and, in the interest of brevity, do not fully repeat the reasoning here.

Basically, there are two considerations which in our view inevitably defeat appellant's position. They are as follows:

1. As support for each of his contentions, appellant asserts that he gained no rights from and hence should not be charged with the acreage in his applications which were not drawn number one in a drawing. But, as the Secretary pointed out, frequently the holders of number one priority and closely subsequent ones do not eventually qualify to receive a lease. We find no place in appellant's brief wherein he states that he would not insist on a lease by virtue of, let us say, his number three priority, if numbers one and two were held to be disqualified. Thus, he would have us eliminate for the present purpose any substance to a priority less than number one, but fails to say that he would not insist on substance to such a priority in another context.

2. Appellant insists that, since the statute speaks of an acreage limitation solely with respect to leases, the Secretary has no authority to apply an acreage limitation to applications or offers to lease. It is true that the statute does not expressly permit a limitation of acreage on applications to lease. It is equally true that it does not expressly forbid such a limitation. But the purpose of the statute is clear—to prohibit the leasing to individuals of acreage beyond the imposed limitation. Certainly, as between the two choices of construction—by the Secretary who was given the duty of subserving the purpose of the Act by administering it—there can be no doubt that the leasing of excess acreage, against the will of Congress, is less likely to occur if the quantity of acreage is curbed as it moves along toward leasing through applications or offers. Applications to lease are an aspect of the leasing process and authority to control the leases is surely authority to control an integral part of the leasing process.

Appellant's contention that the Secretary's control of the acreage in applications to lease "is inconsistent with and in conflict with the statute" (Br. 15) is thus without support in the statute or in reason. Appellant would tie the hands of the Secretary in an important area of administration of the act where Congress itself plainly has not done so. We now detail the reasons why appellant's arguments are invalid.

I

The Secretary's Regulation Properly Included the Acreage in Appellant's Pending Applications to Determine His Chargeable Acreage for Leasing Purposes

Appellant makes many charges that the Secretary's regulation is "in conflict with the statute," an "amendment to the statute," an "abridgment of the statute," etc. The statute which he refers to limits the holding of any one individual in a state to 46,080 acres. That statute does not require the Secretary to entertain applications of an individual to lease lands in quantities beyond that statutory limit. The Secretary has not ruled that he will lease more or less than 46,080 acres to an individual. Hence, the Secretary has not by regulation usurped the legislative function by making or amending the law, so that the decisions prohibiting administrative amendment, relied upon by appellant (Br. 15-20), are not apposite. The Secretary has merely ruled that he will not entertain applications for acreages which, if granted, would exceed the statutory limitation for an individual. Appellant's assertion (Br. 20) that the "right of appellant to take and hold leases up to of 46,080 acres in the State of Wyoming has been improperly and unlawfully qualified or limited by the Secretary's regulation" is assertion of "a right" to apply for leases on acreage exceeding the statutory limitation which the statute does not give him. The Secretary has not enlarged, qualified, limited or abridged the statute.

Instead, the Secretary has simply implemented the statute in the process of administering the Mineral Leasing Act. In *United States v. Macdaniel*, 7 Pet. 1, 14 (1833), it is stated that:

"A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

This approach has only recently been applied to the Mineral Leasing Act and mining laws in *Best v. Humboldt Mining Co.*, 371 U.S. 334, 337 (1963); *Boesche v. Udall*, 373 U.S. 472, 484-485 (1963). Appellant's argument is one of grammatical literalism ignoring the context of the statute and the purposes sought to be accomplished. This Court rejected such an approach when in *Thor-Westcliffe Development, Inc. v. Udall*, 114 U.S. App. D.C. 253, 314 F.2d 257 (1963), cert. den., 373 U.S. 951, it sustained the regulation for simultaneous drawings despite the statutory reference to "first qualified applicant."

The remainder of appellant's discussion under Point I of his brief (Br. 20-24) is merely an expression that he would administer the act differently. This does not render the regulation "invalid and a nullity." Appellant acknowledges (Br. 23) that "the Secretary has a right to know whether there has been overreaching or non-observ-

ance, or the possibility thereof, by anyone of the acreage limitation provisions of the Act" and that in the past "the Secretary has required those filing applications for lease to submit a showing as to the interests held in permits, leases and applications therefor," but, he says, "nowhere in the Secretary's [past] regulations is there the slightest indication that acreage in an application is accountable acreage under the statutory limitation." This, of course, does not prevent making acreage in an application accountable acreage and the present regulations do so in unambiguous terms. Even so, the history of public domain oil and gas leasing shows that this concept has been a part of the program from the beginning.

Thus, from its inception the Mineral Leasing Act has shown congressional concern that monopolies not be created on the public lands.³ Section 13 of the Act of February 25, 1920, 41 Stat. 437, 441, provided for two-year permits to explore up to only 2,560 acres of land. When a discovery was made the permittee was entitled (under Section 14) to a 5% royalty lease covering one-fourth of the area and a right to lease at a higher royalty on the remainder. Under Section 27, 41 Stat. 448, no one individual could hold more than three oil or gas leases in any one state and not more than one lease on the same geologic structure. It provided specifically for forfeiture of any lease held in violation of the limitation whether by means of stock or otherwise. The same section interdicted any combination or holdings which would result in an unlawful trust, a contract in restraint of trade, any form

³ To keep up with the ingenuity of those who would evade the acreage limitation feature of the act has presented a continuous administrative problem. See, e.g., Hearings by Subcommittee of Committee on Interior and Insular Affairs, U.S. Senate, 84th Cong., 2d sess., September 20 to October 1, 1956, U.S. Government Printing Office, No. 87402, "To Investigate Observance or Non-observance of the Acreage Limitation of the Mineral Leasing Act." See also *Pan American Petroleum Corp. v. Pierson*, 284 F.2d 649, 651 (C.A. 10, 1960).

of agreement to control prices or any attempt to hold or control land in excess of the permissible amounts. In the Act of April 30, 1926, 44 Stat. 373, Section 27 was amended to provide that "No person * * * shall take or hold at one time oil or gas leases or permits exceeding in the aggregate 7,680 acres granted hereunder in any one state * * *."

In his regulations administering the 1926 Act, issued pursuant to the provisions of Section 32 of the 1920 Act, 30 U.S.C. sec. 186, the Secretary provided as follows (51 I.D. 475):

Every applicant for oil or gas permit, lease, or for approval of assignment of any interest in such permit or lease must show that, *with the area applied for*, his or its interest or interests in such permits, leases, *and other applications therefor*, directly or indirectly, will not exceed in the aggregate 7,680 acres in any one State and not more than 2,560 acres within the geologic structure of the same producing oil or gas field, together with a full disclosure, nature, and extent of his or its other holdings with identification of the records where such interests may be found.

The Act of August 21, 1935, 49 Stat. 674, 676, did away with the permit system. In his regulations adopted shortly thereafter (55 I.D. 506), 43 C.F.R. (1st ed.) sec. 192.23, the Secretary provided as follows:

Sec. 192.23: * * * The Application must cover in substance the following points: * * *

(c) A statement of the interests, direct and indirect, held by the applicant in permits and leases, *and applications therefor*, in the same State, identifying the records wherein such interests may be found.

The regulations adopted on October 28, 1946, 11 Fed.Reg. 12956, following passage of the Act of August 8, 1946, 60 Stat. 954, which doubled the amount of permissible

acreage and provided for 100,000 acres in options,⁴ contained, in sec. 192.42(c), substantially the same provision as follows:

Sec. 192.42: * * * The application must contain in substance the following:

(c) A statement of the interests, direct and indirect, held by the applicant in oil and gas leases, and applications therefor on public lands in the same State, identifying by serial number the records wherein such interests may be found.

Sec. 192.3 of the same regulations provided, in part, as follows:

No lease will be issued and no assignment will be approved until it has been shown pursuant to the requirements of § 192.42 (b) and (c) that the lessee or assignee is entitled to hold the acreage. Any party found to hold or control accountable acreage computed in accordance with the principles set forth in excess of the prescribed limitations shall be given thirty days within which to file proof of the reduction of his holdings or control so as to conform with the prescribed limitation.

In the regulations adopted December 7, 1954, Circ. 1894, 19 Fed. Reg. 9274, section 192.42 was revised so that the applicable section (192.42(e)(3)) read as follows:

(e) Each offer, when first filed, shall be accompanied by:

* * * *

(3) * * * and in addition, if such offeror is an individual, a statement over the offeror's signature

⁴ The permitted acreage was increased to 46,080 acres plus 200,000 acres in three-year options in the Act of August 2, 1954, 68 Stat. 648. In the Act of September 2, 1960, 74 Stat. 790, 30 U.S.C. (1959-1960 Supp.) sec. 184(d), the acreage limitation was raised to 246,080 acres, inclusive of options.

setting forth the offeror's citizenship and whether the offeror's direct and indirect interests in oil and gas leases, applications, and offers therefor, exceeds 46,080 chargeable acres in the same State, or exceeds 100,000 acres in the Territory of Alaska.

The applicable provisions of section 192.3 were renumbered 192.3(c) and read as follows:

(c) No lease will be issued and no transfer will be approved until it has been shown pursuant to the requirements of § 192.42(e) (4) that the lessee or transferee is entitled to hold the acreage. Any party found to hold or control accountable acreage computed in accordance with the principles above set forth in excess of the prescribed limitations shall be given thirty days within which to file proof of the reduction of his holdings or control so as to conform with the prescribed limitation.

Following that were the amendments of January 13, 1959, Circ. 2009, 24 Fed. Reg. 282, involved here.

Thus, the Secretary has provided that acreage in pending lease applications be reported in connection with determining the amount of acreage chargeable to any particular individual. The reason for this regulation was stated in a 1948 decision of the Secretary (*John H. Trigg*, 60 I.D. 166) as follows:

The Department has held that this statutory limitation as to leases is also applicable to lease applications, because the Department cannot very well entertain applications which it is specifically prohibited by law from granting.

Since the filing of applications is not merely a game, it must be assumed that every applicant seriously intends that his lease application will ripen into a lease. It reasonably follows, therefore, that no one should be permitted to apply for acreage that exceeds the statutory limitation. The same reason expressed in the *Trigg* case was stated in *Albert C. Massa*, 62 I.D. 339, 341 (1955), as follows:

In the interest of expediency in the administration of the act and to discourage the filing of offers for leases which the Department is prohibited by section 27 from issuing, the Department has determined that the limitation imposed by statute on acreage must be applied, administratively, to the acreage included in offers for such leases.

In his decision in this case (JA 33), the Secretary explained why the grace period, formerly allowed applicants for reducing their holdings, was rescinded:

Although the Department, until January 1959 (Circular 2009; 24 F.R. 281), accorded offerors a period of 30 days within which to reduce their holdings in leases and lease offers upon a determination that they held excess acreage without losing priority of filing dates (43 CFR 192.3(c); *Albert Massa et al.*, 63 I.D. 279 (1956), and *John H. Anderson, T. K. and Evelyn H. Sterling*, 67 I.D. 209 (1960)), this was entirely a matter of administrative discretion.

When it became evident that the granting of an opportunity to an offeror to reduce his holdings within a given time led to abuses of the privilege by some offerors and caused confusion and unnecessary delays in the processing of offers, the grace period was eliminated.

We submit that his action was reasonable. It is well-established that a "regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision." *United States v. Morehead*, 243 U.S. 607, 614 (1917); *Forbes v. United States*, 125 F.2d 404, 409 (C.A. 9, 1942). As indicated, the regulation here was designed to aid in enforcing the congressional policy that there be no monopoly interest in government lands in any particular case. Certainly, it is "not in conflict with express statutory provision." Nowhere in the Act does there appear any expression or even intimation that acreage in

existing applications should not be included in measuring chargeable acreage. And, as pointed out previously, the purpose of the regulation is to aid in enforcement of the express congressional purpose, i.e., that no one be permitted to hold more than the maximum lease acreage in any one state. In addition, the Secretary, since 1926, has consistently required a showing that the applicant's interest in leases and pending offers does not exceed the acreage limitation. Congress has never provided otherwise in the numerous subsequent amendments of the 1920 Act. The rule applicable here was stated in *Safarik v. Udall*, 113 U.S. App. D.C. 68, 304 F.2d 944, 950 (1962), cert. den., 371 U.S. 901, as follows:

It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong.

II

The Secretary Properly Charged Appellant With Acreage in Unwithdrawn Offers Even Though Appellant Had Not Obtained a Number One Priority in the Drawings

Appellant asserts that (1) an application to lease has no rights of any kind until a drawing is held, (2) only the successful applicant drawn number one in a drawing can lawfully be charged with acreage, and (3) even the applicant drawn number one has no assurance that the lease will issue to him because the Secretary may decide not to lease the area to anyone (JA 25-27). For these reasons, appellant contends that an applicant has no "control" over the acreage applied for in his applications (JA 28-29).

There are two ready answers to this. First, appellant, on the one hand, forcefully asserts that the Secretary "is

under a mandatory duty to issue a lease to the first qualified applicant" (who may not be the applicant drawn number one or even number two or three). We are sure that he would insist on enforcing that mandatory duty if he were drawn number two and number one failed to qualify. Yet, on the other hand, he insists here that the mandatory duty owed him on account of his application is totally devoid of meaning and effect in terms of "controlling" acreage. We submit that his position is not tenable. Second, appellant supplies no reason why the burden should not be on him and the thousands of other applicants, rather than on the Interior Department, to sort out and remove offers which they might believe have no chance to ripen into leases. The Secretary cannot be certain that the applicant will not attempt to enforce any unwithdrawn offer. As this Court knows, the rulings of the local land managers are frequently challenged through the various steps of the appeal process in the Department and the Secretary is frequently challenged and sued for his rulings on the status of existing applications.⁵

We submit that the foregoing fully answers appellant's contentions, by showing that the Secretary's regulation is a reasonable solution of an administrative problem. But, if elaboration is necessary, we submit the following: Section 17 of the Mineral Leasing Act provides that on certain lands leases shall be noncompetitive and be issued

⁵ Appellant's reference to the status of applications before a drawing and those relating to lands which the Secretary decides not to lease to anyone are not germane here because neither situation is involved. However, there is no reason why the Secretary should not require that applications in those situations must be withdrawn or be counted to avoid confusion and possible mistake. The applicant has some responsibility to keep the house tidy. The applications are his. Wherein is the hardship in requiring him to keep track of them and withdraw them, if he does not intend to urge that they still have some force and effect?

to the first qualified applicant. 30 U.S.C. sec. 226e. This worked well enough for many years. Ordinarily, the first qualified applicant was the only applicant, or one of few. A lease was issued to him and that was that. Later on, however, after a large number of leases had been issued and some of them reached their expiration date and others were subject to voluntary relinquishment permitted under the Act, numerous questions arose as to when such lands became subject to new leasing. For instance, the Secretary's regulation provided that relinquished land would not become subject to re-leasing until the relinquishment was noted in the tract book. This meant that the first to file after the tract book was so noted was entitled to the lease. The result was physical competition to search the records and battles to be the first in line to file for a new lease. (Some of these problems are referred to in such cases as *Wright v. Paine*, 110 U.S.App.D.C. 100, 289 F.2d 766, 768 (1961); *Miller v. Udall*, 113 U.S.App.D.C. 339, 307 F.2d 676 (1962), cert. den., 371 U.S. 967; and *Thor-Westcliffe Development, Inc. v. Udall*, 114 U.S.App.D.C. 253, 314 F.2d 257 (1963), cert. den., 373 U.S. 951.) Intricate problems also developed as to the expiration date of earlier leases. The problem became such that in 1959 the Secretary devised a regulation which did away entirely with the previously existing premium on "first filing" as between numerous applicants. 43 C.F.R. (1961 ed.) sec. 192.43. Under the new regulation, no lands included in cancelled, relinquished or terminated leases are available for re-leasing until (on the third Monday of each month) they have been posted in the land office. Thereafter, all applications received within a five-day period are considered as simultaneously filed and a drawing is held to determine the winner.

Under this system 10,000 acres may be offered at one time. Not everyone bids on the total acreage and the applicant whose name is drawn first has priority, of course, only for the land in his application. It is also true that the individual drawing number one may be

disqualified for some reason. He may not be a citizen; he may have too much acreage; he may have misdescribed the lands; he may have erred in the matter of submitting the proper filing fees; or he may have violated some other applicable requirement. Consequently, the mere fact that an individual has drawn number one supplies no certainty that he will be the lessee. The other applicants remain in the running for the lands drawn by number one until such time as they withdraw their applications or until a lease is issued. Even in the latter case an applicant's right to appeal the award remains for the 30-day appeal period and the issuance of a lease to A may not be fatal to B until his offer is withdrawn or rejected on appeal. Cf. *McKay v. Wahlenmaier*, 96 U.S.App.D.C. 313, 226 F.2d 35 (1955).

Appellant's argument leads to a confusing and almost chaotic situation. All of the other requirements for qualification of each applicant are determined as of the date of application. But appellant's contention necessarily means that the qualification as to acreage is determined as to each application and as to each applicant at individually differing later dates when they may have other applications granted so as to exceed the acreage limitation, or they may relinquish existing leases so as to come below it again. Under this theory, qualification of each applicant could only be determined by re-examining his total holdings at the instant of issuing a lease. No power of issuing thousands of leases a year could go forward under such rules. Cf. *Boesche v. Udall*, 373 U.S. 472, 484 fn. 13 (1963).

Appellant says (Br. 24-25) that although he had 9,551.57 acres in leases and 3,720 acres in applications on May 23, 1960, when he filed his application for 35,614.10 additional acres, he should not have been charged for 3,040 acres included in his prior applications because he had failed to draw number one as to that total in the drawings held before May 23, 1960. He further points to the fact that of the 35,614.10 acres applied for

on May 23, 1960, he was "unsuccessful," that is, he did not draw number one, as to 30,548.47 of them (JA 25).

We submit that the Secretary has validly answered appellant's contention, particularly the meaning which appellant accords "unsuccessful," in the part of the Secretary's opinion previously quoted. In addition, however, with respect to the administrative burden which appellant's position would impose, the Secretary showed the following (JA 35):

To apply the regulation on acreage limitations as Brown urges, that is, to charge only offers that are first in line, would undoubtedly create a tremendous administrative problem. It is common occurrence that many offers are filed which conflict as to some land. Offers A, B, and C may all include Tract 1. Offers A and B may also include Tract 2; offers B and C, Tract 3; offers A and C, Tract 4; and all the offers additional land not in conflict. To determine chargeability, as Brown insists, would require a determination as to which offer had priority as to which tract. This determination would not only have to be made as of the dates when the offers were filed but also at any later date when an offer might be amended or acted upon. For example, in the case described, if, after offers A, B, and C were filed, offer A were relinquished or rejected as to Tract 1, offer B would then become chargeable with Tract 1. The complexities that could arise from such a procedure would be enormous, particularly when it is remembered that a single offer may include as much as 2,560 acres (64 legal subdivisions of 40 acres each). To mention these difficulties is to establish that the Department never intended that the regulation in question should have the meaning urged by the appellant.

This alone, we submit, provides ample justification for the action taken by the Secretary. As long as appellant chose to keep alive the applications wherein he failed to draw number one priority a possibility remained that he would be the successful lease applicant. The Secretary

could not, in the application of his rules and regulations, ignore the fact that these applications remain pending.

Contrary to appellant's contention (Br. 29), the regulations 192.3(a) and 192.3(e)(2) are crystal clear in counting acreage in applications as chargeable acreage. There is no ambiguity. Similarly, contrary to appellant's contention (Br. 32-34), there was no reason for a special regulation stating that "unsuccessful applications" are included in "applications." We have shown that the "unsuccessful application" concept is appellant's alone. The regulation does not qualify applications and there is no reason why it must. Appellant controls his own applications and he could easily withdraw those which he would not insist on, if they should ultimately reach a priority status.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

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FEBRUARY 1964

BRIEF FOR APPELLANT AND JOINT APPENDIX

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 18,275

DISTRICT OF COLUMBIA,

APPELLANT,

v.

SAMUEL SUSSMAN, ET AL.,

APPELLEES.

No. 18,276

DISTRICT OF COLUMBIA,

APPELLANT,

v.

ARTHUR INVESTMENT COMPANY, INC.,

APPELLEE.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 18 1964

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QUESTIONS PRESENTED

Where valid District real property taxes are outstanding against property which is condemned subsequent to the commencement of the tax year, although payment of the taxes is not delinquent, and where, pending final court determination of the right of the District to payment of the taxes in full, a portion of the condemnation proceeds are, by District Court order, retained in its registry, the questions presented are:

1. Is not the District entitled, out of the proceeds of condemnation, to payment in full of the amount of real property taxes assessed against the property and unpaid at the time of the taking?
2. May the Court properly order the District to pay to the owners of the property condemned interest upon such amount in the Court's registry as may finally be determined not to be payable to the District?
3. If the District may properly be required to pay interest on the amount referred to in Question 2, is not the maximum rate 4 per cent per annum?
4. Does the District Court have the authority to prohibit the District from charging interest on the amount of unpaid real property taxes after the time for payment has expired?

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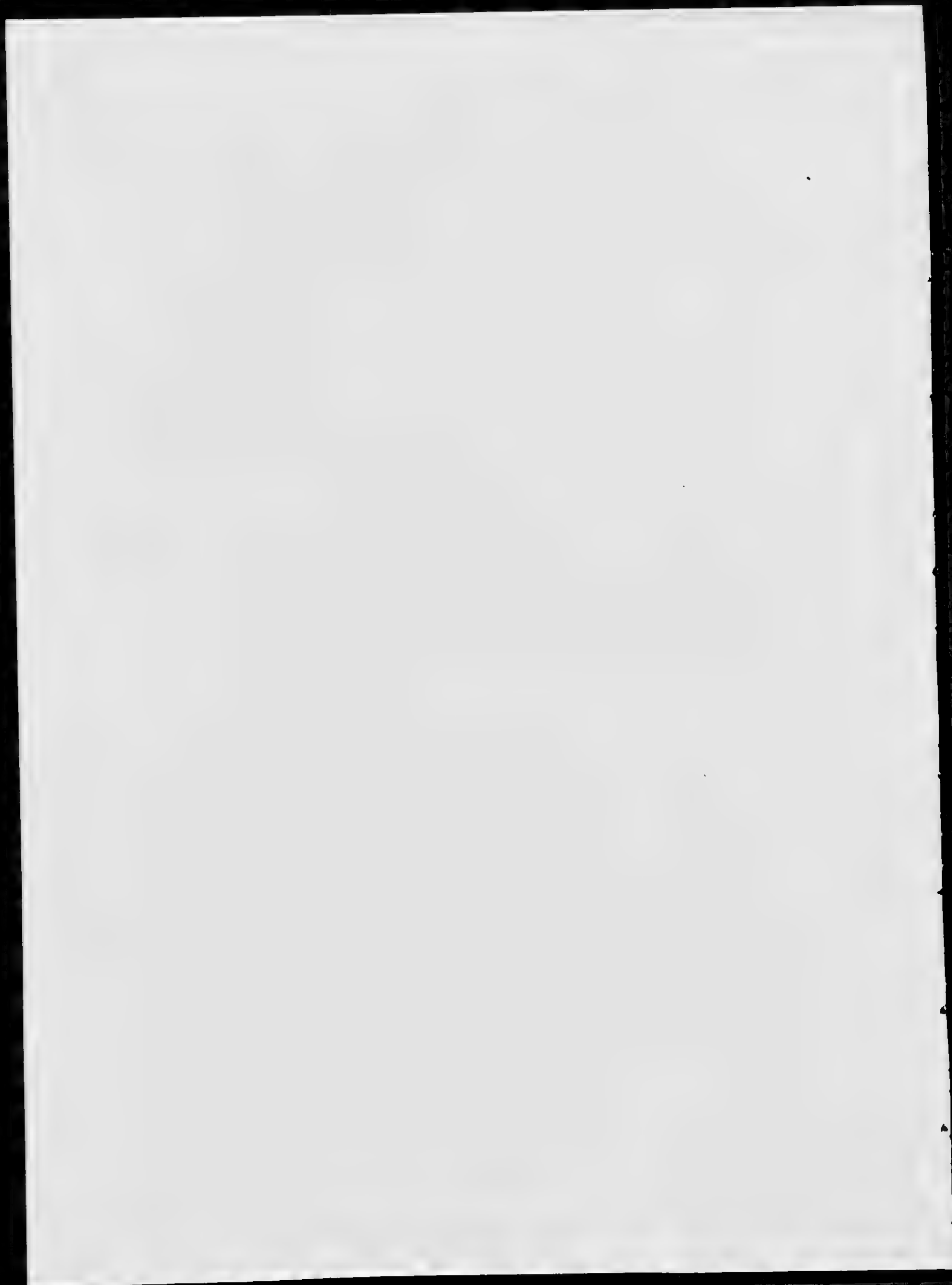
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,)	
)	
APPELLANT,)	
)	
v.)	No. 18, 275
)	
SAMUEL SUSSMAN, ET AL.,)	
)	
APPELLEES.)	
)	
DISTRICT OF COLUMBIA,)	
)	
APPELLANT,)	
)	
v.)	No. 18, 276
)	
ARTHUR INVESTMENT COMPANY, INC.,)	
)	
APPELLEE.)	

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

On December 31, 1963, the District of Columbia filed a motion to consolidate the above entitled cases for purposes of the filing of briefs and a single joint appendix and for argument, which motion was, on January 6, 1964, granted. Since the facts in each case are not identical, they will be set out separately. The argument will, however, pertain to both cases.

JURISDICTIONAL STATEMENT

This is an appeal from two final orders of the United States District Court for the District of Columbia entered on October 16, 1963, and October 24, 1963, respectively, in separate actions for distribution of funds held in escrow by a title company (J.A. 13, 26). Notice of appeal was filed by the District on November 5, 1963, in both cases. (J.A. 15, 28.) The jurisdiction of the District Court was invoked under D.C. Code, 1961, § 11-306. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE AS TO APPELLEES
SAMUEL AND ETTA SUSSMAN

The United States of America, on July 26, 1963, filed in the United States District Court for the District of Columbia a declaration of taking for Lot 814 in Square 379, owned by Samuel Sussman and Etta Sussman, and deposited in the registry of that court the sum of \$200,000.00 as estimated just compensation for the property (J.A. 1, 4). Pursuant to the declaration of taking, an order was entered on August 9, 1963, requiring the Clerk to draw a check to the order of Samuel and Etta Sussman for the amount so deposited (J.A. 4). The order further required that the check be delivered to Lawyers Title Insurance Corporation of Richmond, Virginia (918 - 16th Street, N.W., Washington, D.C., 20006), with

instructions to the title company, as follows:

"apply the proceeds of said check to the payment of all taxes and assessments, due or exigible on said real property at the date of said declaration of taking, and to the redemption of all tax sales, if any, on said real property and to the payment and discharge of all liens and encumbrances of whatsoever nature on said real property, after which the balance, if any, shall be paid by said title company to the parties entitled thereto." (Emphasis supplied.)

Appellees Samuel and Etta Sussman thereafter filed a motion to require the title company to pay over to them the sum so held in escrow for District of Columbia real property taxes for the fiscal year 1964 amounting to \$3,000.00 (J.A. 6). On September 24, 1963 the District of Columbia filed a memorandum in opposition to appellees' motion. The United States of America also filed a memorandum in reply to appellees' motion, but its memorandum is not pertinent to the issues raised on this appeal. After oral argument on the motion Judge Edward A. Tamm of the District Court filed a memorandum opinion on October 1, 1963 (J.A. 12). Thereafter, on October 16, 1963, an amended order was entered, which provides, in part, as follows:

"FURTHER ORDERED that Lawyers Title Insurance Corporation be and it is hereby authorized and directed to pay to the District of Columbia 8.33 % of the taxes assessed for the period July 1, 1963 to June 30, 1964 on Lot 814 in Square 379 and that the District

of Columbia shall accept payment of said sum in full satisfaction and discharge of District of Columbia taxes assessed for the period July 1, 1963 to June 30, 1964 on Lot 814 in Square 379 and any liens on the award in condemnation relative to such taxes;

FURTHER ORDERED that Lawyers Title Insurance Corporation be and it is hereby authorized and directed to deposit into the Registry of the Court the remaining 91.67 % of the funds held by that company in escrow for payment of taxes allegedly due to the District of Columbia on Lot 814 in Square 379 for the period July 1, 1963 to June 30, 1964, said funds to be held in the Registry of the Court until the time for the District of Columbia to appeal this order shall have lapsed without an appeal being taken, in which event said funds shall be paid by the Clerk of the Court to petitioners Samuel Sussman and Etta Sussman, or until such time as this order shall have been finally disposed of upon appeal; provided that in the event petitioners' right to all or any portion of said funds so deposited shall be upheld on appeal or if no appeal is taken, the District of Columbia shall pay to petitioners Samuel Sussman and Etta Sussman interest on the funds to which they shall be found entitled at the rate of 6 % per annum from the date such funds are deposited into the Registry of the Court until released and paid to said petitioners;

FURTHER ORDERED that no penalty or interest for nonpayment of said taxes when due shall be assessed by the District of Columbia for the period the matter of said taxes is pending before the Court." (J.A. 13.)

On November 5, 1963, the District filed its notice of appeal to this Court (J.A. 15).

STATEMENT OF THE CASE AS TO APPELLEE
ARTHUR INVESTMENT CO., INC.

The United States of America, on August 6, 1963, filed in the United States District Court for the District of Columbia, a complaint in condemnation and a declaration of taking for Lots C, 804 and 829, in Square 378 owned by the appellee, Arthur Investment Co., Inc., (J.A. 17). At the same time, the United States deposited in the registry of the court \$292,600.00 as estimated just compensation for the said lots. Pursuant to the declaration of taking, an order was entered on August 30, 1963, requiring the Clerk to draw a check to the order of appellee for the amount deposited and deliver the same to Lawyers Title Insurance Company of Richmond, Virginia, with instructions to that company, as follows:

" * * * apply the proceeds of said check to the payment of all taxes and assessments due or exigible on said real property at the date of said declaration of taking, and to the redemption of all tax sales, if any, on said real property and to the payment of all liens and encumbrances of whatsoever nature on said real property, after which the balance, if any, shall be paid by said title company to Petitioner." (J.A. 20.)

Pursuant to the order, the title company withheld \$2,512.95 for the payment of District of Columbia real property taxes for the fiscal year 1964 amounting to \$2,412.95. Appellee then filed a motion to require the title company to pay over to it the amount so withheld for taxes (J.A. 22). The District filed a

memorandum in opposition and, after oral argument on the motion, Judge Edward A. Tamm entered an order on October 24, 1963, which is substantially the same as the order entered in the Sussman case with the exception of the percentage of tax to be paid to the District (J. A. 28).

The District, on November 5, 1963, appealed to this Court from that order.

STATUTES INVOLVED

D. C. Code, 1961:

" § 11-306.

Said courts shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States; and any one of the judges may hold a criminal court for the trial of crimes and offenses arising within the District. "

" § 47-701.

All real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name of the owner, or trustee or trustees of the owner thereof. All undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided, according to law, or has otherwise passed into the possession of some other person or persons; and all real property, the ownership of which is unknown, shall be assessed 'owner unknown.' "

" § 47-702.

Assessments of real estate in the District of Columbia for purposes of taxation shall be made annually in the same manner and subject to the same limitations as heretofore provided by law for making biennial assessments of real estate in said District. "

" § 47-703.

Real estate in the city of Washington, except such as may be exempt by law from taxation, shall be assessed according to the number of the squares and lots thereof, or parts of lots, and upon the number of the square or superficial feet in each square or lot, or parts of a lot, and in the county the agricultural lands shall be assessed by the acre, and suburban lots by the square foot, as in the city of Washington. "

" § 47-704.

The commissioners shall furnish each member of said Board of Assistant Assessors with the necessary maps and field books, which shall contain an accurate list of each tract, together with a pertinent description of the real property situate in the District of Columbia, and, as far as may be known, the owner thereof; and also such blanks, forms, books, surveys, and plats as may be necessary for a systematic statement of the property to be assessed, and shall also furnish the said Board of Assistant Assessors with the necessary conveyance to view said property for assessment. Upon the completion of the assessment the said Board of Assistant Assessors shall deposit with the assessor of the District of Columbia all maps, field books, surveys, and plats, and all notes and memoranda thereof, and same shall be open to inspection by any taxpayer of said District. "

" § 47-705.

Said Board of Assistant Assessors shall, from actual view and from the best sources of information in its reach, determine the value of each separate tract or lot of real property in the District of Columbia in lawful money, and shall separately estimate the value of all improvements on any tract or lot, and shall note the same in the proper field book, which shall be carried out as part of the value of such tract or lot, and shall also return the dimensions of each tract or lot, and said assistant assessors shall also perform such other official duties as may be required of them by the Commissioners of the District of Columbia. "

" § 47-706.

Said Board of Assistant Assessors shall annually on or before the 1st Monday of January make out and deliver to the assessor of the District of Columbia a return in tabular form, contained in a book to be furnished by the commissioners, of the amount, description, and value of the real property subject to be listed for taxation in the District of Columbia. "

* * *

" § 47-708.

The Assessor and Deputy Assessor of the District and the board of all of the assistant assessors, with the Assessor as chairman, shall compose a Board of Equalization and Review, and as such Board of Equalization and Review they shall convene in a room to be provided for them by the Commissioners, on the first Monday of January of each year, and shall remain in session until the first Monday in April of each year, after which date no complaint as to valuation as herein provided shall be received or considered by such Board of Equalization and Review. Public notice of the time and place of such session shall be given by publication for two successive days in

two daily newspapers in the District not more than two weeks or less than ten days before the beginning of said session. It shall be the duty of said Board of Equalization and Review to fairly and impartially equalize the value of real property made by the board of assistant assessors as the basis for assessment. Any five of said Board of Equalization and Review shall constitute a quorum for business, and, in the absence of the Assessor, a temporary chairman may be selected. They shall immediately proceed to equalize the valuations made by the board of assistant assessors so that each lot and tract and improvements thereon shall be entered upon the tax list at their value in money; and for this purpose they shall hear such complaints as may be made in respect of said assessments, and in determining them they may raise the valuation of such tracts or lots and improvements as in their opinion may have been returned below their value and reduce the valuation of such as they may believe to have been returned above their value to such sum as in their opinion may be the value thereof."

" § 47-709.

The valuation of the real property made and equalized as aforesaid shall be completed not later than the first Monday of May annually. The valuation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law, except as hereinafter provided. Any person aggrieved by any assessment, equalization, or valuation made may within ninety days after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404: Provided, however, That such person shall have first made his complaint to the Board of Equalization and Review respecting such

assessment as herein provided, except that, in case of increase of valuation of real property over that for the immediately preceding year, where no notice in writing of such increase of valuation is given the taxpayer prior to March 1 of the particular year, no such complaint shall be required for appeal."

* * *

" § 47-1003.

* * * Provided, however, That failure on the part of the District, from any cause whatsoever, to enforce the liens acquired aforesaid shall not release the property from any tax whatsoever that may be due the District * * *."

* * *

" § 47-1011.

Whenever any real estate in the District of Columbia has been, or shall hereafter be, offered for sale for nonpayment of taxes or assessments of any kind whatsoever, and shall have been bid off in the name of the District of Columbia, and more than two years shall have elapsed since such property was bid off as aforesaid and the same has not been redeemed as provided by law, the Commissioners of said District may, in the name of the District aforesaid, petition the United States District Court for the District of Columbia, sitting in equity, to enforce the lien of said District for taxes or other assessments on the aforesaid property by decreeing a sale thereof; and up to the time of the sale hereinafter provided for such property may be redeemed by the owner or other person having an interest therein by the payment of all taxes or assessments due the District of Columbia upon said property and all legal penalties and costs thereon, together with such other expenses as may have been incurred by said District prior to, and as a result of, the filing of the action herein provided for."

" § 47-2413 (d).

Any other provision of law to the contrary notwithstanding, if it shall be determined by the Assessor, the Board of Tax Appeals for the District of Columbia, or any court having jurisdiction over the subject matter that there has been an overpayment of any tax, whether as a deficiency or otherwise, interest shall be allowed and paid upon such overpayment of tax at the rate of 4 per centum per annum from the date such overpayment was paid until the date of refund: Provided, That with respect to that part of any overpayment which was not assessed and paid as a deficiency or as additional tax such interest shall be allowed and paid only from the date of filing a claim for refund, a petition to the Board, or a complaint with a court of competent jurisdiction, as the case may be."

* * *

" § 47-1209.

Real-estate taxes and personal taxes of all kinds shall hereafter be payable semiannually in equal instalments in the months of September and March. If either of said instalments on real or personal property shall not be paid within the months when the same is due, said instalments shall thereupon be in arrears and delinquent, and there shall be added and collected with said tax a penalty of 1 per centum per month upon the amount thereof for the period of such delinquency, and such instalment or instalments, with the penalties thereon, shall constitute a delinquent tax to be collected in the manner now provided by law.

If any person neglects or refuses to file a return of personal property as required by law, and the assessor certifies to the Board of Commissioners that, in his opinion, the best information obtainable does not afford a satisfactory basis for assessment, the Board of Commissioners may, by petition to the United States District Court for the District of Columbia for mandamus against such person, compel the filing of a sworn return, and in such case the court shall require the person at fault to pay all expenses of the proceeding."

United States Code:

Title 28, § 1291. "Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12 (e), 72 Stat. 348."

* * *

Title 40, § 258a.

* * *

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

D. C. Code, 1961, § 16-628, provides in pertinent part:

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

D. C. Code, 1961, § 16-639. "Payment of compensation into court--
Vesting of title.

Payment into the registry of the court for the use of all parties entitled of the sum of money adjudged to be just compensation for the lands to be condemned and taken, or for any parcel thereof,

or any interest therein, shall constitute payment of such compensation. Upon such payment, the petitioner shall be entitled to an order declaring that the title to the lands in respect of which such compensation is so paid is vested in the United States of America. The money so paid into the registry of the court shall be deemed to be vested in the persons owning or interested in said lands, according to their respective estates and interests, and said money shall take the place and stand in lieu of the lands condemned. The court, upon the application of the petitioner or of any party in interest, shall have power to determine and direct who is entitled to receive payment of the money so paid into the registry, and may, in its discretion, order a reference to the auditor of the court or a special master to ascertain the facts on which such determination and direction are to be made."

STATEMENT OF POINTS AS TO
SAMUEL SUSSMAN AND ETTA SUSSMAN

1. The United States District Court erred in ordering Lawyers Title Insurance Corporation to pay to the District of Columbia 8.33 per cent of the real property taxes assessed for the fiscal year beginning July 1, 1963, and ending June 30, 1964, on Lot 814 in Square 739, instead of the full amount of real property taxes then due to the District of Columbia for the fiscal year 1964.

2. The United States District Court for the District of Columbia erred in ordering that the sum of \$241.99, or 8.33 per cent of the taxes assessed by the District of Columbia against

the above-described real property for the fiscal year 1964, be accepted by the District of Columbia in full satisfaction and discharge of District of Columbia real property taxes assessed, due, and unpaid on the aforementioned real property for the fiscal year 1964.

3. The United States District Court erred in ordering the District of Columbia to pay to appellees Samuel Sussman and Etta Sussman interest at the rate of 6 per cent per annum on the funds to which they shall be found entitled from the date said funds are deposited in the Registry of the United States/^{District}Court until released and paid to said appellees.

4. The United States District Court erred in ordering that no penalty or interest for nonpayment of the real estate taxes involved when due shall be assessed by the District of Columbia for the period the matter of said taxes is pending before the Court.

STATEMENT OF POINTS AS TO
ARTHUR INVESTMENT COMPANY, INC.

1. The United States District Court erred in ordering Lawyers Title Insurance Corporation to pay to the District of Columbia 16.7 per cent of the real property taxes assessed for the fiscal year beginning July 1, 1963, and ending June 30, 1964, on Lot C, 804 and 829 in Square 378, instead of the full amount of real property taxes then due to the District of Columbia for the fiscal year 1964.

2. The United States District Court for the District of Columbia erred in ordering that the sum of \$402.96, or 16.7 per cent of the taxes assessed by the District of Columbia against the above-described real property for the fiscal year 1964, be accepted by the District of Columbia in full satisfaction and discharge of District of Columbia real property taxes assessed, due, and unpaid on the aforementioned real property for the fiscal year 1964.

3. The United States District Court erred in ordering the District of Columbia to pay to appellee Arthur Investment Co., Inc., interest at the rate of 6 per cent per annum on the funds to which it shall be found entitled from the date said funds are deposited in the Registry of the United States District Court until released and paid to said appellee.

4. The United States District Court erred in ordering that no penalties or interest for nonpayment of the real estate taxes involved when due shall be assessed by the District for the period the matter of said taxes is pending before the Court.

SUMMARY OF ARGUMENT

In this jurisdiction, the status of real property with relation to liability to taxation is fixed at the beginning of the tax year and remains the same throughout that year unaffected by any change in the use or ownership of the property during the year. Nor are such taxes subject to proration. The District Court's orders of August 9 and August 30 correctly provided for the payment of all taxes and assessments "due or exigible" at the time of the filing of the declarations of taking of the real properties involved. The word "due", as used in the court's orders, means the existence of an obligation; the word "exigible" means a liquidated and demandable or matured claim. The District's taxes were "due", as well as "exigible", and the District is entitled to their payment in full out of the proceeds of the condemnation.

Even assuming, arguendo, that real property taxes assessed against the condemned properties were not "due" or "exigible" on July 1, 1963, District of Columbia liens for those taxes attached and were, under the District real property tax statutes, in existence as of that date, and were not dependent upon a delinquency in the payment thereof. Since liens existed, the District is entitled to payment of the full amount of the taxes pursuant to the District Court's orders requiring "payment and discharge of all liens and encumbrances of whatsoever nature on said real property."

The District Court's orders of October 16 and October 24 were incorrect in ordering the District to pay to the appellees, if they should prevail, interest on such amount as they may finally be entitled to receive from the sums deposited in the registry of the court. Even if the amounts in the court's registry could be said to be in the possession of the District, the District is, by statute, limited to payment of interest at the rate of 4 per cent per annum on overpayments of any tax. Finally, the court's orders prohibiting the District from assessing interest for the nonpayment of taxes on the condemned properties are in direct conflict with a District statute which provides that interest shall be added in the event real property tax payments are not made within the times prescribed therefor.

ARGUMENT

I

The District Court's orders of August 9 and August 30, 1963, correctly directed payment to the District of Columbia of the entire amounts of real property taxes here involved.

The original orders entered by the District Court directing disposition of the monies deposited by the United States in the registry of the court stated that the funds were to be turned over to the title company for distribution to appellees after first applying the amount necessary to the payment, inter alia, of all taxes and assessments due or exigible on said real property at the date of the declaration of taking.

Numerous cases construing the word "due" are referred to in Words and Phrases, Permanent Edition. In general, it appears that although the word "due" has different meanings depending upon the circumstances under which it is used, an accepted meaning relates it to the existence of an obligation, irrespective of the time set for its payment.

In Furrow v. C.I.R., 292 F.2d 604, 606, it was said:

"The word 'due' may mean that the debt or obligation to which it is applied has become immediately payable, or it may mean that the debt has become ascertained and fixed, although payable in the future. * * *." [Emphasis supplied.]

In United States v. Reis, 214 F.2d 327, 329, the court discussed the word "due" as follows:

"The word 'due' is a word of more than one meaning. It may mean that which is immediately payable, or it may mean a simple indebtedness without reference to time of payment, in which latter sense it is synonymous with 'owing', and includes all debts whether payable in praesenti or futuro. * * *."

In United States v. Automatic Heating and Equipment Co., 181 F.Supp. 924, 928, the court discussed the meaning of the word "due" as follows:

"The word 'due' means 'owed or owing' as distinguished from payable. A debt is often said to be due from a person where he is the party owing it, or primarily bound to pay, whether the time for payment has or has not arrived. The same thing is true of the phrase 'due and owing'. Black's Law Dictionary, Fourth Edition.

"Another definition of the word 'due' is 'that which is due or owed; debt.' Webster's New International Dictionary, Second Edition.

"The word 'due' is defined owed, owing, owing and unpaid, remaining unpaid, an indebtedness * * *."

As pointed out, the original orders of the District Court required the payment of taxes and assessments "due" or "exigible." Black's Law Dictionary, Fourth Edition, defines "exigible" as "Demandable; requireable", and defines an "exigible debt" as "A liquidated and demandable or matured claim." The use of the

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"A liquidated and demandable or matured claim." The use of the

disjunctive in the orders indicates that the Court recognized that there is a difference in the meanings of the word "due" and the word "exigible", and that it was the Court's intention that all outstanding liability for taxes, whether matured or not, should be satisfied out of the condemnation proceeds, as stated in Gulf Refining Co. of Louisiana v. Glassell, 186 La. 190, 171 S.846, 853:

"The meaning of an exigible debt, as used in this connection [right of action given to creditors by Article 1166 of the Code Napoleon], is that there must be a liquidated and demandable or matured claim. * * *."

D.C. Code, 1961, § 47-709, provides in pertinent part:

" * * * The valuation of the real property made and equalized as aforesaid shall be completed not later than the first Monday of May annually. The valuation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law, except as hereinafter provided. * * *."
(Emphasis supplied.)

It is the established rule in the District of Columbia that taxability of property is determined by its status as of the first day of the tax year. The status of the property for tax purposes remains the same throughout the tax year regardless of a subsequent change in the use or ownership thereof.

In Washington Mosque Foundation, Inc. v. District of Columbia, (D.C., B.T.A., Dkt. No. 969), 74 W.L.R. 1189, the

District of Columbia Tax Court made the following statement:

" * * * In the absence of indication of legislative intent to the contrary, the status of property as to liability for, or exemption from, taxation remains throughout the tax year as it was at the beginning of each year unaffected by a change in the use of the property during the tax year. "

See also Beckwill Realty Corp. v. City of New York, 254 N.Y. 425, 173 N.E. 570. People v. Ladies of Loretto, 346 Ill. 403, 92 N.E. 908.

Since the entire real property taxes were "due" on July 1, 1963, and the taxes were "exigible", the properties formerly owned by appellees were not relieved from those taxes because the United States filed against them declarations of taking. This Court, in Congregational Home of District of Columbia v. District of Columbia, 92 U.S.App.D.C. 73, 202 F.2d 808, 811, held:

"We assume, without deciding, that the Commissioners have the power, before approving the equalized valuations, not only to correct the valuations submitted to them, but also to correct the list of taxable real estate by removing therefrom any parcels they deem exempt from taxation. Under that assumption they could grant a petition for exemption filed before July first but, once they have approved the equalized valuations of real estate subject to taxation, those valuations 'constitute the basis of taxation for the next succeeding year.' Taxability has been then finally determined, assessment has been completed, and the Commissioners have no further function except to fix a tax rate which will raise the required revenue. A tax at that rate is then automatically levied by statute. §501

"The Assessor next performs the clerical work of computing the taxes due with respect to each parcel of real estate and mails to the taxpayer a statement thereof which, under §2403, 'shall be considered notice of assessment with respect of such taxes.'

"The practice of applying to the Commissioners after July first for the exemption of real estate which has been administratively determined to be taxable and has been finally assessed--if there be such a practice--finds no support in the statutes. After the process of assessment has been completed,--that is, after the equalized valuations of all taxable property have been approved by the Commissioners--the only relief available to a taxpayer, either from an incorrect valuation or from the wrongful assessment of property thought to be exempt, is by appeal to the Board of Tax Appeals."

See also Trustees of St. Paul Methodist Episcopal Church South v. District of Columbia, 94 U.S.App.D.C. 78, 212 F.2d 244, in which this Court affirmed the principle enunciated in Congregational Home. In District of Columbia v. General Federation of Women's Clubs, Inc., 191 U.S.App.D.C. 411, 249 F.2d 503, this Court said:

"H.R. 8493, 84th Cong., was passed by the House of Representatives on March 26, 1956, and by the Senate on June 20, 1956. When approved by the President on July 2, 1956, as Private Law 737, 70 Stat. A108, the legislation declared that certain defined property of the respondent 'is hereby exempt from all taxation.' While the intent of Congress is clear, the Act is silent as to liability for taxes which might have accrued prior to its approval by the President. On that account, the District of Columbia asserted

tax liability in respect of respondent's real estate for the fiscal year 1957, which commenced on Sunday, July 1, 1956.

"It is true that the fiscal year of the District of Columbia commences, annually, on the first day of July, D.C. Code, § 47-101 (1951), and that Congress has 'levied for each and every fiscal year, a tax * * *.' D.C. Code, § 47-501 (1951). However the latter section expressly provides that the tax is levied only on such real and personal property as is 'subject to taxation,' so that no tax is levied on exempt property. The statutory scheme clearly treats of real property 'subject to be listed for taxation in the District of Columbia,' D.C. Code, § 47-706 (1951), subject to review, D.C. Code, § 47-708, and 'The valuation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis of taxation for the next succeeding year * * *.' D.C. Code, § 47-709 (1951). In like manner 'Annually, on or prior to July 1 of each year, the board of assistant assessors shall make a list of all real estate which shall have become subject to taxation and which is not then on the tax list * * *.' D.C. Code, § 47-710 (1951).

It is apparent that here, as in most jurisdictions, the established rule is that taxability of property is determined by its status as of the first day of the tax year. Moreover, since the tax is assessed and levied on or before July 1 of the fiscal year involved, the tax persists throughout the ensuing tax year and it cannot be prorated except by specific statutory direction. In Collector of Revenue v. Ford Motor Company, 158 F.2d 354, 356, a case directly in point, the Circuit Court of Appeals for the Eighth Circuit concluded:

"We think the court erred in holding that in the absence of some state law to the contrary, the lien for taxes might be split or apportioned. The rule is that absent some state law to the contrary, such lien must be paid in its entirety. The court's decision was therefore not based upon any affirmative local law or decision of the State of Missouri, but rather upon the theory that there were neither statutes nor decisions applicable to the situation. The court applied what it deemed to be the general law and invoked the authority vested in the court by Title 40 U.S.C.A. §258a, which provided in part that, 'The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.' This statute does not purport to give power to a Federal court to fix the amount of taxes due when the proper authorities of the state have made that decision through the administrative machinery adopted by the state for that purpose; in fact, Congress has no power to enact a state taxing measure. Thompson v. State of Louisiana, 8 Cir., 98 F.2d 108. The power granted and the duty imposed by this statute to do equity are manifestly intended to empower the court to do justice among rival conflicting claimants. It does not empower the court to invalidate in part a valid entire tax lien. * * *" (Emphasis supplied.)

II

The District's lien for real property taxes attached to the property at the time of assessment.

In Cobb v. United States, 84 U.S.App.D.C. 228, 172 F.2d 277, 278 (1949), a case in which the District of Columbia, though not a direct party to the proceeding, had entered as amicus curiae, the Court said:

" * * * Tax liens and sales of the District of Columbia are governed by D.C. Code (1940) Title 47 §§ 1001-1015. 'Since no reference is made in the statute to a lien for taxes except in connection with taxes in arrears, it is a reasonable interpretation that the lien does not arise prior to the occurrence of a delinquency.' * * *. ¹

In its amicus curiae brief, the District stated at page 16:

"This proceeding is not concerned with the question of priority of liens as asserted by the United States (Brief, United States, p. 6). As hereinbefore stated, the question relates to the effect of two separate deeds issued under authority of laws enacted by the Congress of the United States. * * *"

The District did not, in entering the case/^{as} a friend of the court, brief the question of when its lien for real property taxes first arose. So far as counsel for the District can determine, the present cases are the first presenting this question in which the District is a party litigant. Moreover, it is also the first presentation for review of the matter of proration of District real property taxes in condemnation proceedings.

Assuming, arguendo, that real property taxes assessed against the condemned properties were not "due or exigible" on July 1, 1963, the District Court's orders of August 9th and August 30th, 1963,

¹ Apparently, the Court relied for this statement solely upon an opinion of the Court of Appeals for the Fourth Circuit in Commissioner of Internal Revenue v. Rust's Estate, 116 F.2d 636, 638. Cobb v. United States does not further review or discuss this matter.

further provided that the proceeds in the hands of the title company were to be applied to the payment and discharge of all liens and encumbrances on said real property. If valid tax liens are outstanding at the time of the taking, then they must be satisfied from the award. See United States v. 25/936 Acres of Land, 153 F.2d 277, 279. In Collector of Revenue v. Ford Motor Co., supra, the Court, while making it clear that it had no power to invalidate a tax lien, provided the lien had attached, further stated that the local law must be looked to to determine when the lien attached. As the Cobb case pointed out, section 47-1003, D.C. Code, 1961, which provides for real property tax sales, is silent as to when the District's lien for taxes attaches to the real property in question.

But Section 47-1011, D.C. Code, 1961, entitled "Liens on real estate for unpaid taxes — Enforcement — Redemption before sale", provides:

"Whenever any real estate in the District of Columbia has been, or shall hereafter be, offered for sale for nonpayment of taxes or assessments of any kind whatsoever, and shall have been bid off in the name of the District of Columbia, and more than two years shall have elapsed since such property was bid off as aforesaid and the same has not been redeemed as provided by law, the Commissioners of said District may, in the name of the District aforesaid, petition the United States District Court for the District of Columbia, sitting in equity, to enforce the lien of said District for taxes or other assessments on the

aforesaid property by decreeing a sale thereof; and up to the time of the sale hereinafter provided for such property may be redeemed by the owner or other person having an interest therein by the payment of all taxes or assessments due the District of Columbia upon said property and all legal penalties and costs thereon, together with such other expenses as may have been incurred by said District prior to, and as a result of, the filing of the action herein provided for. * * *." (Emphasis supplied.)

Although this section does not mention a specific time when the District's lien for real property tax attaches to taxable property, it does make references to the manner in which the District Court, sitting in equity, is to enforce the lien of said District for taxes, and provides that it may be accomplished by decreeing a sale of the property upon which the taxes have not been paid.

Section 47-1003, D.C. Code, 1961, refers to liens acquired by the District, and says:

"Provided, however, That failure on the part of the District, from any cause whatsoever, to enforce the liens acquired aforesaid shall not release the property from any tax whatsoever that may be due the District * * *." (Emphasis supplied.)

Appellate courts have stated time and time again that the question of whether a lien for taxes exists must be determined by the law of the state which imposes the tax. A case on all fours with the present cases is United States v. 3 Parcels of Land in Woodbury County, Iowa, 198 F.Supp. 529, decided in October of 1961. Therein a controversy had arisen as to the status of realty taxes

levied upon certain parcels of land that were being condemned by the United States. According to that case, the taxing process begins in Iowa with assessment by the County Assessor of the property to be taxes, and the assessment is completed prior to May 1 of each year. The assessment rolls are delivered to the County Board of Review, which meets the first Monday of each May and, between then and June 1, it may reevaluate and reassess certain property. Upon the determination of the assessments, the county auditor forwards an abstract of the results to the State Tax Commission, which, prior to the third Monday in August, equalizes the assessments, and the county auditor is furnished with the results thereof. The next step is the levying of taxes, which is determined by the various state taxing authorities based on their need for revenue. At its September session, the county board of supervisors levies taxes on the assessed value of the property in the county. The county auditor then prepares a list describing the property, the owners, and the amount of the tax, and the list is delivered to the county treasurer by January 1 of the following year, at which time taxes become payable. In Iowa there are only two code provisions which refer in any way to the existence of a lien on the real estate for the tax owed. One provision relates to a lien between vendor and purchaser, and is not applicable to the present situation. The other provision reads as follows:

" * * * Lien of taxes on real estate.
 Taxes upon real estate shall be a lien thereon
 against all persons except the state. * * *"

This statute, although creating a lien, does not specify the date the lien shall attach.

The District of Columbia's assessment of property taxes takes place in much the same manner as in Iowa. Assessments are made annually by lot and square in the name of the owner. The Board of Assistant Assessors then determines the value in money of each separate tract or lot, and on or before the first Monday of January, makes out and delivers to the Assessor a return in tabular form of the amount, description, and value of all the real property in the District subject to be listed for taxation. A board of Equalization and Review remains in session from the first Monday of January to the first Monday of April to hear complaints as to valuation and to equalize assessments made by the Board of Assistant Assessors, and the valuation of the real property so made and equalized is completed not later than the first Monday of May. Such valuation is then approved by the Commissioners not later than the following July 1 and, when so approved constitutes the basis of taxation for the next succeeding year.² See Sections 47-701 to 47-710, D.C. Code, 1961.

² C.f. The Congregational Home of the District of Columbia v. District of Columbia, *supra*.

Because of the near identity of taxing processes between the District and Iowa, the comments of the Court in United States v. 3 Parcels of Land, supra, are of extreme interest:

"Ordinarily it is not a matter of concern to the taxing authority whether or not the lien actually attaches at an earlier date than is specified in Section 445.30, since the lien follows the property from grantor or grantee. The taxing authority is ordinarily not interested in asserting such a lien until taxes have become delinquent in the following year. It is only in the infrequent situation where the property falls into exempt hands before December 31 that it makes any difference to the taxing authority at what time the lien attached. Because of this feature, there is very little Iowa law relating to the problem raised in the present case."

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" * * * It would seem from the foregoing that the Iowa Supreme Court is of the view that the date upon which the lien of real estate taxes attaches to the land is the date the levy is made. It would also seem that the Court felt that the date established by the vendor-purchaser statute (Section 445.30) was not the date upon which the lien attached. It expressly refused to apply that statute and went to some length to demonstrate that the lien attached at the time of levy."

The District Court also cited Gates v. Wirth, 181 Iowa 19, 163 N.W. 215, wherein it was stated:

" * * * The duty to pay, in order to discharge the land, as between title owners, rests, generally speaking, on the owner of the land at the time the annual tax to be levied is actually ascertained, fixed, and levied, and this obligation to pay in no event arises until the work of the board of supervisors was completed in September. This is the first

time that the specific annual tax for the year became a lien upon the property, and this is the first time that an obligation rested on any one to discharge the tax in order to free the land from the burden." (Emphasis supplied.)

The District Court also referred to Helvering v. Johnson County Realty Co., 128 F.2d 716, and stated:

" * * * The Court held that under the Iowa law the lien attached to the property in September, 1935, when the levy was made and thus was an existing lien when the property was purchased. In so holding, the Court relied upon Cornelius v. Kromminga, supra, and Gates v. Wirth, supra.

*

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*

" * * * it would seem that the Iowa Supreme Court has indicated that it is of the view that real estate taxes become a lien on the land at the time of levy. The Court of Appeals for this circuit has so interpreted the Iowa law."

In summing up its review of the Iowa State law in United States v.

3 Parcels of Land, supra, the District Court concluded:

" * * * In the present case the United States, having paid the compensation for the tract in question into court, had no interest in the matter of the payment of tax liens. Such liens were payable out of the amount paid into court. Therefore, the United States has no interest with the former owners as to the payment of such liens. The only interest as to the payment of the taxes is between the former owners and Woodbury County. * * *

" It is the holding of the Court that the lien for the 1960 real estate taxes attached to the property in question at the time of the levy, which was

October 3, 1960. It is the further holding of the Court that such lien now attached to the award in the registry of this Court and must be satisfied from said award." (Emphasis supplied.)

The facts of that case are substantially identical with those existing in the instant case. The lien of the District attached to the real property at the time the assessments of taxes were made on or before July 1, 1963, and that lien now attaches to those funds in the registry of the Court. Since the Court has no authority to prorate real property taxes in the District of Columbia, the taxes assessed should be paid in full from the funds in the hands of the title company.

III

The District Court's orders of October 16 and October 24 improperly ordered payments of interest by the District, to appellees and improperly prohibited the District from assessing interest.

The District Court's order of October 16, 1963, directed Lawyers Title Insurance Corporation to pay to the District of Columbia 8.33 per cent of the real property taxes assessed for the period July 1, 1963, to June 30, 1964, on the property involved in that order to deposit the balance of 91.67 per cent in the registry of the court. The order further directed that the District pay to the Sussmans interest at the rate of 6 per cent per annum on the balance, if any, to which they are found to be entitled from the date the funds

were deposited in the registry of the court. Finally, the court ordered that no penalties or interest for nonpayment of real property taxes should be assessed by the District for the period the matter was pending before that court.

The District Court's order of October 24, 1963, directed the title company to pay to the District 16.7 per cent of the real property taxes assessed for the period July 1, 1963, to June 30, 1964, on the property involved in that order and to deposit the balance of 83.3 per cent in the registry of the court. This order also directed the payment of 6 % interest by the District to the former owner, Arthur Investment Company, Inc., on the balance, if any, which might be found to be due to it; and likewise provided that no penalties or interest should be assessed for nonpayment of taxes during pendency of the matter therein.

In compliance with these orders, the title company thereafter paid to the District the amounts required thereby to be paid, and deposited the balances in the registry of the Court. The amounts so deposited are not now, and have never been, in the possession of the District of Columbia.

Section 47-2413 (d), D.C. Code, 1961, refers to overpayment of taxes, and provides as follows:

" (d) Any other provision of law to the contrary notwithstanding, if it shall be determined by the Assessor, the Board of Tax Appeals for the District of Columbia, or any court having jurisdiction over the subject matter that there has been an overpayment of any tax, whether as a deficiency or otherwise, interest shall be allowed and paid upon such overpayment of tax at the rate of 4 per centum per annum from the date such overpayment was paid until the date of refund: * * *." (Emphasis supplied.)

This section refers to the overpayment of taxes and to the amount of interest that may be allowed on such overpayment; but it contemplates that the tax shall first have been paid to the District of Columbia. In the present cases, 91.67 per cent and 83.3 per cent respectively of the taxes were never paid to the District. Insofar as counsel for appellant can ascertain, no provision of law either directs or permits the District to pay any interest on taxes which are not in its possession or under its control. The very purpose of depositing money in the registry of the court is to provide a neutral depository for litigants in which neither side can, until the litigated issues are decided, assert any control over the money so deposited. Since the District has never been in possession of the sums deposited by the title company in the registry of the District Court, it should not be compelled to pay interest thereon. Even assuming, arguendo, that the money deposited in the registry of the court could be construed to be an overpayment of real property taxes in the

District's possession or under its control, Section 47-2413 (d), supra, limits to 4 per cent per annum and not to 6 % the interest on overpayments of any tax.

Since, as stated, the court's orders prohibit the District from assessing interest for the nonpayment of the taxes here involved, its orders are in those respects in direct conflict with Section 47-1209, D.C. Code, 1961, which provides in pertinent part:

" * * * If either of said instalments on real or personal property shall not be paid within the months when the same is due, said instalments shall thereupon be in arrears and delinquent, and there shall be added and collected with said tax a penalty of 1 per centum per month upon the amount thereof for the period of such delinquency, and such instalment or instalments, with the penalties thereon, shall constitute a delinquent tax to be collected in the manner now provided by law."

CONCLUSION

For the reasons stated above, the District Court's orders of October 16, and October 24, 1963, respectively, should be reversed with instructions to that court to enter orders directing payment to the District of Columbia of the full amount of real property taxes assessed against the condemned properties of appellees for the fiscal year 1964.

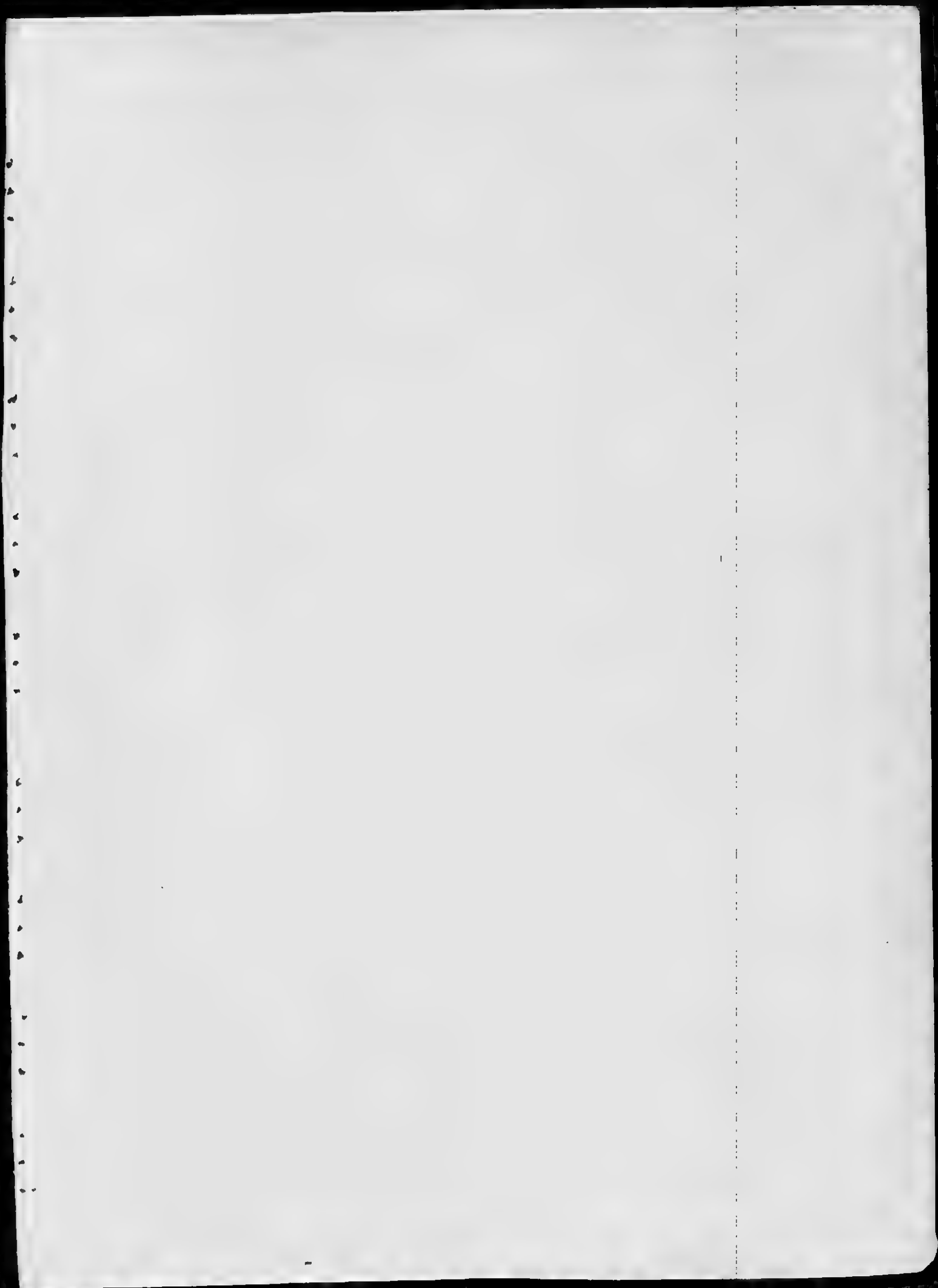
CHESTER H. GRAY
Corporation Counsel, D.C.

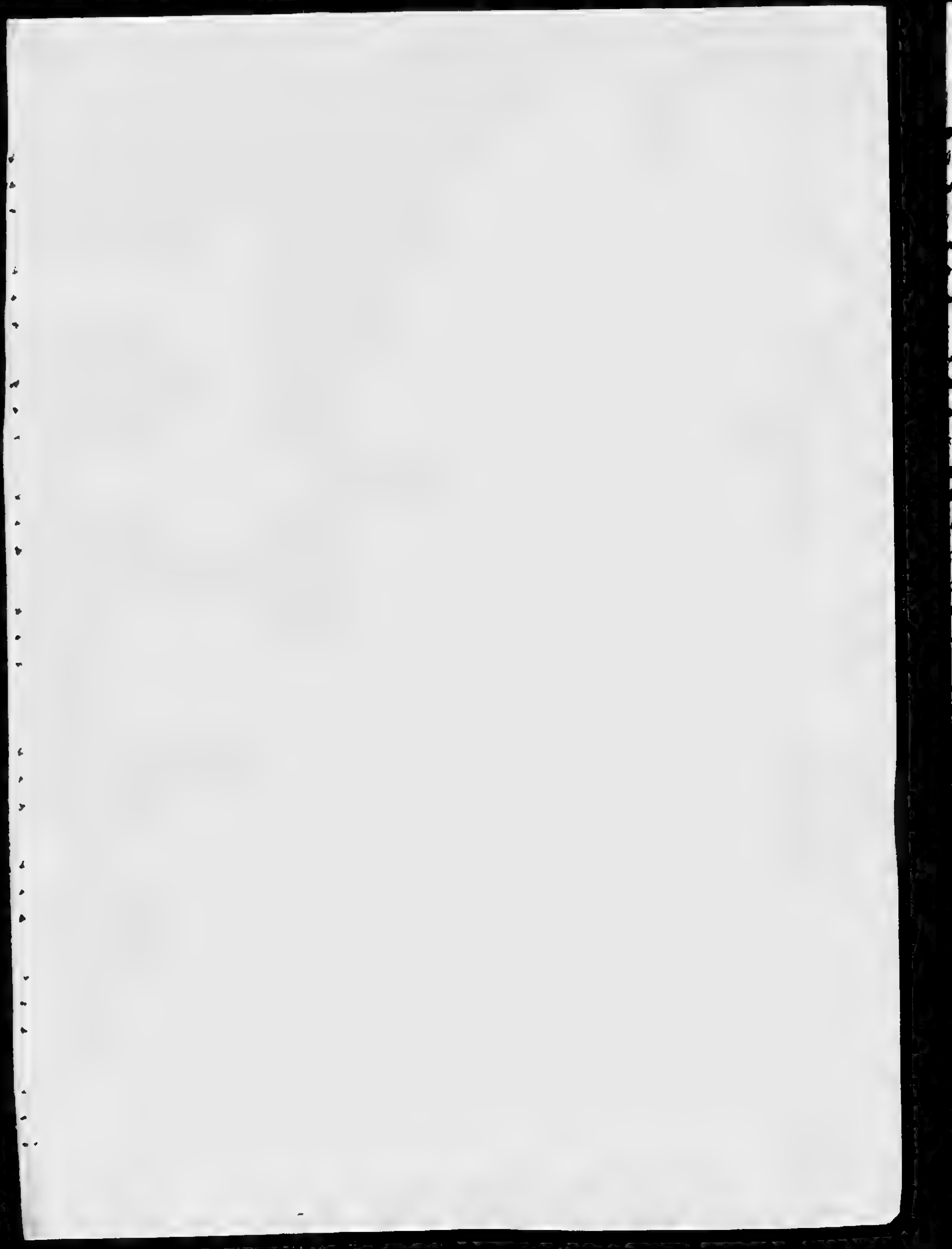
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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT COURT
DOCKET NO. 29-63

UNITED STATES OF AMERICA,

PLAINTIFF,

v.

CERTAIN LAND IN THE CITY OF
WASHINGTON, DISTRICT OF
COLUMBIA, AND SAMUEL SUSSMAN
AND ETTA SUSSMAN, HIS WIFE,
ET AL, AND UNKNOWN OWNERS,

DEFENDANTS.

COMPLAINT

Filed JUL. 26, 1963

1. This is an action of a civil nature brought by the United States of America at the request of the General Services Administration for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of August 1, 1888 (25 Stat. 357, c. 728), as amended; the Act of March 1, 1929 (45 Stat. 1415), as amended; District of Columbia Code (1961 Edition), secs. 16-619 to 16-644; the Federal Property and Administrative Services Act of 1949, approved June 30, 1949 (63 Stat. 377), as amended; the Public Buildings Act of 1959, approved September 9, 1959 (73 Stat. 479), as amended; and the Independent Offices Appropriation Act, 1963, approved

October 3, 1962 (76 Stat. 716), and all other acts amendatory of or supplementary to the said acts.

3. The public use for which said land is to be taken is as a site for the construction and maintenance of the Federal Bureau of Investigation Building in the City of Washington, District of Columbia, and for such other uses as may be authorized by Congress or by Executive Order.

4. The interest in the property to be acquired is an estate in fee simple absolute, subject, however, to the right of the owners of public utility facilities, if any, upon, over, or under the land to remove such facilities.

5. The property in and to which the foregoing interest and estate is to be taken is described in Exhibit "A" hereto attached.

6. The persons, firms or corporations having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the land records and whose names have otherwise been learned are set forth in Exhibit "C" hereto attached.

7. The Board of Commissioners of the District of Columbia may have or claim an interest in the subject property by reason of taxes and assessments due and exigible.

8. All persons, firms and corporations named as defendants herein are joined as defendants generally to the end that all right, title, interest and estate of all said defendants in and to any and all of the lands

herein involved shall be divested out of them and vested in plaintiff.

9. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to plaintiff, and such persons are made parties to the action under the designation "Unknown Owners".

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

* * *

Trial by jury of the issue of just compensation is demanded by plaintiff.

* * *

EXHIBIT "A"

The property to be taken together with all buildings and improvements thereon, all appurtenances thereto, and all interests therein, and together with all right, title and interest of the owners in and to all streets, roads, avenues, alleys, alleyways, and rights of way abutting or in anywise appertaining to the land lying and being in the City of Washington, District of Columbia is described as follows:

PARCEL 1

Lot 814, in Square 379, containing an area of 2,500.00 square feet, more or less, as shown on plan entitled "Plat of Survey" (S. O. 67898), dated March 15, 1963, prepared in the Office of the Surveyor for the District of Columbia.

* * *

EXHIBIT "C"

The persons, firms and corporations having an interest in the property to be acquired herein, whose names are ascertainable by a reasonably diligent search of the land records and whose names have otherwise been learned are as follows:

PARCEL 1

Samuel Sussman

4119 Fernhill Ave.
Baltimore, Md.

Etta Sussman

4119 Fernhill Ave.
Baltimore, Md.

* * *

District of Columbia

c/o Commissioners of the District
of Columbia
District Building
14th and E Streets, N. W.
Washington, D. C.

* * *

ORDER FOR PAYMENT OF MONEY
AS TO PARCEL 1

Filed AUG 9 1963

Upon consideration of the petition of Samuel and Etta Sussman filed herein on August 2, 1963, and it appearing to the Court that on July 26, 1963, upon the filing of a declaration of taking herein, the United States of America paid into the registry of this court the sum of \$200,000.00 as the estimated compensation for Parcel 1 being Lot 814 in Square 379

whereby the title to the said property vested in the United States of America; and it being represented to this Court that petitioners are the parties entitled to the said sum and that the petitioners stipulated that the check to be issued for the amount of said deposit shall be delivered to a certain title company and endorsed while in its possession in order that all taxes, assessments, liens and encumbrances may be satisfied and discharged out of the proceeds thereof and the balance then remaining paid over to said petitioners, it is by the Court this 9th day of August, 1963,

ORDERED that the clerk of the court draw his check forthwith upon the entry of this order, against the fund paid into the registry of this court, as aforesaid, to the order of said petitioners in the amount of \$200,000.00, that the clerk deliver said check to Lawyers Title Insurance Corporation; that petitioners shall endorse said check while in the possession of said title company and that said title company shall apply the proceeds of said check to the payment of all taxes and assessments, due or exigible on said real property at the date of said declaration of taking, and to the redemption of all tax sales, if any, on said real property and to the payment and discharge of all liens and encumbrances of whatsoever nature on said real property, after which the balance, if any, shall be paid by said title company to the parties entitled thereto;

IT IS FURTHER ORDERED that any additional amount finally awarded as just compensation, when deposited in the registry of the Court

shall be subject to the satisfaction and discharge of all taxes and assessments in respect of said property at the date of said declaration of taking, and all liens and encumbrances of whatever nature existing thereon.

s/ LEONARD P. WALSH
JUDGE

Presented by and consented to:

s/ ANTHONY C. LIOTTA
Attorney, Department of Justice

s/ Henry H. Brylawski
Henry H. Brylawski
Attorney for Petitioners

* * *

MOTION TO REQUIRE TITLE COMPANY
TO RELEASE FUNDS TO PETITIONERS

Filed AUG. 14, 1963

Petitioners Samuel and Etta Sussman respectfully move this Honorable Court that an order be entered herein requiring the Lawyers Title Insurance Corporation to pay to them funds which have been withheld in escrow for taxes.

Petitioners were the record owners of Lot 814, in Square 379, which property was taken in condemnation by the United States of America pursuant to notice filed herein on July 26, 1963.

On August 2, 1963, a petition was filed to require the sum of \$200,000, deposited in the Registry of the Court by the United States of America as estimated compensation for the aforesaid Lot 814 in Square 379,

to be paid to petitioners. Pursuant to this petition an order was entered on August 9, 1963, requiring the Clerk of this Court to draw his check to the order of petitioners and deliver the said check to Lawyers Title Insurance Corporation with the following instruction to said title company to:

"apply the proceeds of said check to the payment of all taxes and assessments, due or exigible on said real property at the date of said declaration of taking, and to the redemption of all tax sales, if any, on said real property and to the payment and discharge of all liens and encumbrances of whatsoever nature on said real property, after which the balance, if any, shall be paid by said title company to the parties entitled thereto."

All taxes and assessments on the said property have been paid through June 30, 1963. The only tax due and payable at this time, if any, would be that portion of the fiscal year 1964 taxes which were owed to the District of Columbia on July 26, 1963.

Notwithstanding that the period during which the petitioners owned this property during the fiscal year 1964 was less than one month, the Lawyers Title Insurance Corporation has withheld from its payment to these petitioners the sum of \$3000.00, being an amount sufficient to pay real estate taxes on the said property for the entire fiscal year of 1964, which taxes would have been in the sum of \$2905.00. At the request of your petitioners, the title company is holding the said sum of \$3000.00 in escrow pending the determination as to how much should be paid as taxes to the District of Columbia.

Petitioners believe that the said Lawyers Title Insurance Corporation should be instructed by the Court to pay to petitioners all sums being held by it as aforesaid except for a prorata amount equal to the portion of the tax year 1964 that the said property was in the name of these petitioners, to wit, 26/365th of the year's total tax assessment.

* * *

Washington, D. C.

Friday, September 27, 1963

EXCERPTS OF PROCEEDINGS
(Pages: 1 to 5)

- 1 The above-entitled matter came on for hearing on motion to require title company to release funds before the HONORABLE EDWARD A. TAMM, United States District Court Judge.

* * *

- 2 THE DEPUTY CLERK: United States of America versus Certain Land in the City of Washington, D. C.

* * * * *

THE COURT: As a practical consideration, isn't this rather unfair to the property owner?

MR. McCALLY: Yes, it is, Your Honor. There is no question about that.

THE COURT: I assume that there is no allowance in the amount

paid for the, shall we say, accrued taxes in the sense that they run through the current year. The award does not include an allowance for those taxes as a practical matter, or are you prepared to comment on it?

MR. McCALLY: Yes. Not specifically as such but when an award is made, we take this position, Your Honor: that the United States Government, or the District, in condemning expects to receive a fee simple title and in considering this award, everything is considered, the amount for the land and whatever is necessary to give that title to the Government.

Now, I realize that normally speaking, taxes are adjusted. We have had condemnation cases in which the tax has been put in evidence and it has been considered. But, I

3 don't know what the jury considers when they decide on the award.

We do take the position that we expect to get the land and fee simple and in doing that, it includes taking care of whatever outstanding liens and encumbrances, or anything else, are on it.

* * * * *

While it is true that this rule is harsh, we feel that the District Court ordered the taxes to be paid. It was an encumbrance; they were due. I believe the cases which I have cited deal specifically with the question of proration. Since there be no proration of taxes, the United

States Government fully protected itself here by requiring that all taxes due and all encumbrances be paid, and I think the order of the Court, Your Honor, should be upheld in this case.

THE COURT: Does the United States desire to be heard in this matter?

MR. LIOTTA: Yes, if I may.

May it please the Court, as far as distribution in the case is concerned, the cases cited in our brief are ample to show that we really have no interest, no legal interest. However, I do feel that in the interest of the United States, I must make a statement to protect our interest in future condemnation cases.

4 The first statement I would like to make is counsel for the District Government, speaking probably for the District of Columbia itself in the conduct of condemnation cases, stated that the evidence as to taxes has been admitted into evidence. This is contrary to anything that has ever been done insofar as the federal cases are concerned. As a matter of fact, the Court on all occasions has instructed the jury to disregard and not even to attempt to find out what the tax assessment was as to the property.

The United States maintains the position that any evidence as to taxes admitted into evidence would bring forth a motion probably for a mistrial.

Your Honor, as far as the title to the United States is concerned, under the D. C. Code, the Declaration of Taking Act provides that when we file our declaration of taking, title vests in the United States free and clear of all liens.

Our sole interest in the matter of distribution is the matter of being an amicus curiae to the Court if requested. We do assist in distribution. The liens, if any, that are payable as of the date of taking attach to the award and any subsequent sale by the United States would still be free and clear of the liens. That is our position. I think our brief so states.

5 Therefore, Your Honor, I do respectfully submit that the question of whether or not there was a lien as of the date of taking is really the issue here before Your Honor. As far as distribution is concerned, that is a matter between the lienor and lienee and the United States is a legally disinterested party as far as distribution is concerned.

THE COURT: Very well.

Anything more?

* * * * *

* * *

MEMORANDUM

Filed OCT. 1, 1963

The Court is of the opinion that the position of the District of Columbia in this case is an unfair and inequitable one. The Court feels that the property owners in this, or any similar case, should not be responsible for taxes upon their property except for the period when it was under their control and when their properties were available for their use.

The Court will, accordingly, direct that the title company release to the petitioners Samuel Sussman and Etta Sussman the funds held by that company in escrow, subject only insofar as District of Columbia taxes are concerned to a withholding of 8.33 % of the taxes assessed for the period from July 1, 1963 to June 30, 1964. This computation is based upon the fact that date of taking under the condemnation order was July 26, 1963.

(S) Edward A. Tamm

Dated: 10/1/63

Filed OCT. 16, 1963

* * *

**AMENDED ORDER FOR DISTRIBUTION OF FUNDS
HELD IN ESCROW BY TITLE COMPANY**

This cause having come before the Court on the motion of Samuel Sussman and Etta Sussman that an order be entered herein requiring Lawyers Title Insurance Corporation to release to them certain funds which had been held in escrow for taxes allegedly due to the District of Columbia on Lot 814 in Square 379 which property was formerly owned by petitioners and was taken in condemnation by the United States of America on July 26, 1963, and it appearing to the Court after consideration of the arguments at oral hearing and of the points and authorities filed herein, the property owners in this cause should not be responsible for taxes upon their property except for the period when it was under their control and available for their use and the Court having on the 8th day of October, 1963 entered an order authorizing and directing the Lawyers Title Insurance Corporation to release certain of the funds held by that company in escrow, and the Lawyers Title Insurance Corporation and the District of Columbia having moved this Court to enlarge and modify its order of October 8, 1963, after consideration of the arguments at oral hearing, it is by the Court this 16th day of October, 1963,

ORDERED, ADJUDGED AND DECREED that its order of October 8, 1963 be and the same is hereby vacated;

FURTHER ORDERED that Lawyers Title Insurance Corporation be and it is hereby authorized and directed to pay to the District of Columbia 8.33 % of the taxes assessed for the period July 1, 1963 to June 30, 1964 on Lot 814 in Square 379 and that the District of Columbia shall accept payment of said sum in full satisfaction and discharge of District of Columbia taxes assessed for the period July 1, 1963 to June 30, 1964 on Lot 814 in Square 379 and any liens on the award in condemnation relative to such taxes;

FURTHER ORDERED that Lawyers Title Insurance Corporation be and it is hereby authorized and directed to deposit into the Registry of the Court the remaining 91.67 % of the funds held by that company in escrow for payment of taxes allegedly due to the District of Columbia on Lot 814 in Square 379 for the period July 1, 1963 to June 30, 1964, said funds to be held in the Registry of the Court until the time for the District of Columbia to appeal this order shall have lapsed without an appeal being taken, in which event said funds shall be paid by the Clerk of the Court to petitioners Samuel Sussman and Etta Sussman, or until such time as this order shall have been finally disposed of upon appeal; provided that in the event petitioners' right to all or any portion of said funds so deposited shall be upheld on appeal or if no appeal is taken, the District of Columbia shall pay to petitioners Samuel Sussman and Etta Sussman interest on the funds to which they shall be found entitled at the rate of 6 % per annum

from the date said funds are deposited into the Registry of the Court until released and paid to said petitioners;

FURTHER ORDERED that no penalty or interest for nonpayment of said taxes when due shall be assessed by the District of Columbia for the period the matter of said taxes is pending before the Court.

s/ Edward A. Tamm
Judge

SEEN:

* * *

* * *

Filed NOV. 5, 1963

NOTICE OF APPEAL

Notice is hereby given this 5th day of November, 1963, that the District of Columbia, a municipal corporation, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from an order of this Court entered on the 16th day of October, 1963, entitled "AMENDED ORDER FOR DISTRIBUTION OF FUNDS HELD IN ESCROW BY TITLE COMPANY", in favor of Samuel Sussman and Etta Sussman, his wife, and against the District of Columbia.

* * *

** ** *

DISTRICT COURT DOCKET NO. 29-63

DATE	PROCEEDINGS
7/26/63	Complaint, jury action; Exh A & C
7/26	Declaration of taking; Schedule A & B
8/2	Petition of Samuel and Etta Sussman for payment as to Par 1, Lot 814, Sq 379
8/9	Paid \$200,000 to Samuel Sussman & Etta Sussman by Registry check # 3767 (Par. 1)
8/14	Motion of Samuel & Etta Sussman to require title company to release funds
9/14	Opposition of District of Columbia to motion to require title company to release funds to petitioner
9/26	Supplementary P & A of Samuel Sussman et al in support of motion to require title company to release funds
9/27	Motion to require title company to release funds argued and taken under advisement Tamm, J.
10/1	Memorandum directing title company to release funds
10/16	Amended order for distribution of funds held in escrow by title company as to Lot 814
10/28	Deposited into the Registry \$2,663.01 by the Lawyers Title Ins. Corp. pursuant to order of Court filed 10-16-63
11/5	Notice of appeal of the District of Columbia; copy mailed to Henry H. Brylawski, 224 E. Capitol St., Anthony C. Liotta, U. S. Ct. House, Ronald E. Madsen, Southern Bldg.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT COURT
DOCKET NO. 31-63

UNITED STATES OF AMERICA,

PLAINTIFF,

v.

CERTAIN LAND IN THE CITY OF
WASHINGTON, DISTRICT OF
COLUMBIA, AND PHILIP MILSTONE,
ET AL, AND UNKNOWN OWNERS.

DEFENDANTS

COMPLAINT

Filed AUG. 6, 1963

1. This is an action of a civil nature brought by the United States of America at the request of the General Services Administration for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of August 1, 1888 (25 Stat. 357, c. 728), as amended; the Act of March 1, 1929 (45 Stat. 1415), as amended; District of Columbia Code (1961 Edition), secs. 16-619 to 16-644; the Federal Property and Administrative Services Act of 1949, approved June 30, 1949 (63 Stat. 377), as amended; the Public Buildings Act of 1959, approved September 9, 1959 (73 Stat. 479), as amended; and the Independent Offices Appropriation Act, 1963, approved

October 3, 1962 (76 Stat. 716), and all other acts amendatory of or supplementary to the said acts.

3. The public use for which said land is to be taken is a site for the construction and maintenance of the Federal Bureau of Investigation Building in the City of Washington, District of Columbia, and for such other uses as may be authorized by Congress or by Executive Order.

4. The interest in the property to be acquired in an estate in fee simple absolute, subject, however, to the right of the owners of public utility facilities, if any, upon, over, or under the land to remove such facilities.

5. The property in and to which the foregoing interest and estate is to be taken is described in Exhibit "A" hereto attached.

6. The persons, firms or corporations having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the land records and whose names have otherwise been learned are set forth in Exhibit "C" hereto attached.

7. The Board of Commissioners of the District of Columbia may have or claim an interest in the subject property by reason of taxes and assessments due and exigible.

8. All persons, firms and corporations named as defendants herein are joined as defendants generally to the end that all right, title, interest and estate of all said defendants in and to any and all of the

lands herein involved shall be divested out of them and vested in plaintiff.

9. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to plaintiff, and such persons are made parties to the action under the designation "Unknown Owners".

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

* * *

Trial by jury of the issue of just compensation is demanded by plaintiff.

* * *

EXHIBIT "A"

The property to be taken together with all buildings and improvements thereon, all appurtenances thereto, and all interests therein, and together with all right, title, and interest of the owners in and to all streets, roads, avenues, alleys, alleyways, and rights of way abutting or in anywise appertaining to the land, lying and being in the City of Washington, District of Columbia, is described as follows:

* * *

PARCEL 2

Lots C, 804 and 829, in Square 378, containing a total area of 9,693.10 square feet, more or less, as shown on plan entitled "Plat of Survey" (S. O. 67898), dated March 15, 1963, prepared in the Office of the Surveyor for the District of Columbia.

* * *

EXHIBIT "C"

The persons, firms and corporations having an interest in the property to be acquired herein, whose names are ascertained by a reasonably diligent search of the land records and whose names have otherwise been learned are as follows:

* * *

PARCEL 2

Arthur Investment Co., Inc., a D. C. Corporation	c/o Daniel H. Margolis 918 16th St., N. W. Washington, D. C.
* * *	
District of Columbia	c/o Commissioners of the District of Columbia District Building 14th & E Sts., N. W. Washington, D. C.
* * *	

ORDER FOR PAYMENT OF MONEY AS TO PARCEL 2.

Filed AUG. 30, 1963

Upon consideration of the petition of defendant, Arthur Investment Company, Inc., a District of Columbia corporation, (hereinafter referred to as Petitioner) filed herein on August 29, 1963, and it

appearing to the Court that on August 6, 1963, upon the filing of a declaration of taking herein, the United States of America paid into the registry of this Court the sum of \$292,600.00 as the estimated just compensation for the taking of the property described in Exhibit A to the Complaint as Parcel 2, being Lots C, 804 and 829 in Square 378, whereby the title to the said property vested in the United States of America: and it being represented to this Court that Petitioner is the party entitled to the said sum and that the Petitioner has stipulated that the check to be issued for the amount of said deposit shall be delivered to a certain title company and endorsed while in its possession in order that all taxes, assessments, liens and encumbrances may be satisfied and discharged out of the proceeds thereof and the balance then remaining paid over to said Petitioner, it is by the Court this 30th day of August, 1963,

ORDERED that the Clerk of the Court draw his check forthwith upon the entry of this Order against the fund paid into the registry of this Court as aforesaid, to the order of said Petitioner in the amount of \$292,600.00; that the Clerk deliver said check to the Lawyers Title Insurance Corporation of Richmond, Virginia, 918 - 16th Street, N.W., Washington, D.C.; that Petitioner shall endorse said check while in the possession of said title company and that said title company shall apply the proceeds of said check to the payment of all taxes and assessments due or exigible on said real property at the date of said declaration of

taking, and to the redemption of all tax sales, if any, on said real property and to the payment of all liens and encumbrances of whatsoever nature on said real property, after which the balance, if any, shall be paid by said title company to Petitioner;

IT IS FURTHER ORDERED that any additional amount finally awarded as just compensation, when deposited in the registry of the Court shall be subject to the satisfaction and discharge of all taxes and assessments in respect of said property at the date of said declaration of taking, and all liens and encumbrances of whatever nature existing thereon.

/s/ LEONARD P. WALSH
JUDGE

Presented by and consented to:

/s/ ANTHONY C. LIOTTA
Attorney, Department of Justice

* * *

MOTION (1) FOR PAYMENT OF FUNDS WITHHELD TO
PAY REAL ESTATE TAXES, OR (2) FOR AN ORDER
DECLARING A PORTION OF SUCH WITHHELD FUNDS
AS CONSTITUTING AN ELEMENT TO BE CONSIDERED
IN FIXING JUST COMPENSATION

Filed SEP. 27, 1963

Petitioner, Arthur Investment Company, Inc., a District of Columbia corporation, and a defendant in the above-entitled cause of action, respectfully represents to the Court as follows:

1. That on August 6, 1963, the United States of America

("Plaintiff") filed a complaint in condemnation and declaration of taking herein for the taking of Petitioner's property, being Lots C, 804 and 829 in Square 378 in the District of Columbia ("subject property"), and deposited the sum of \$292,600.00 in the registry of the Court as estimated just compensation for said property.

2. That on August 30, 1963, pursuant to Petitioner's request, and in accordance with District of Columbia Code, §16-628 (1961 Edition), this Court entered an order requiring the Clerk of the Court to draw his check forthwith against the fund paid into the registry of the Court to the order of Petitioner in the amount of \$292,600.00 and to deliver said check to the Lawyers Title Insurance Corporation of Richmond, Virginia, 918-16th Street, N. W., Washington 6, D. C., with instructions to said title company to:

"apply the proceeds of said check to the payment of all taxes and assessments due or exigible on said real property at the date of said declaration of taking, and to the redemption of all tax sales, if any, on said real property and to the payment of all liens and encumbrances of whatsoever nature on said real property, after which the balance, if any, shall be paid by said title company to Petitioner."

3. That on September 6, 1963, settlement with respect to subject property was held at the office of said title company, and that said title company withheld from the funds payable to Petitioner, among other items, the sum of \$2,512.95, being an amount sufficient to pay

District of Columbia real property taxes on subject property for the entire fiscal year 1964, such taxes being \$2,412.95, plus \$100.00 for possible penalties.

4. That on August 6, 1963, there were no taxes "due or exigible" on subject property, that under District of Columbia law no property taxes became payable, and hence "due or exigible," on subject property prior to September, 1963, and that said sum of \$2,512.95 was therefore as a matter of law wrongfully withheld from Petitioner.

5. That in addition, as a matter of equity, because Petitioner only owned subject property during fiscal year 1964 for a period of 37 days, this Court should not allow more than 37/366 of the taxes for fiscal year 1964 (leap year) to be withheld from Petitioner or, in the alternative, should order any excess amounts withheld to be included as an element of just compensation payable by plaintiff.

WHEREFORE, Petitioner, Arthur Investment Company, Inc. respectfully requests this Court, pursuant to its powers under D. C. Code §16-628 (1961 Edition), to enter an order:

1. declaring that no taxes were due or exigible on subject property on August 6, 1963;
2. declaring that the sum of \$2,512.95 was wrongfully withheld from petitioner; or, in the alternative, that no more than \$243.93 (being 37/366 of \$2,412.95)

should have been withheld from petitioner on account of its ownership of subject property until August 6, 1963; and directing Lawyers Title Insurance Corporation of Richmond, Virginia to pay such sums wrongfully withheld to Petitioner forthwith; or

3. as an alternative to the above requests, declaring that any taxes required under District of Columbia law to be paid with respect to subject property for fiscal 1964 and relating to a period of time subsequent to August 6, 1963, be added to any amount of just compensation hereinafter determined by this Court to be applicable to the subject property.

Petitioner further requests an order staying the accrual of penalties and interest on taxes payable to the District of Columbia until thirty days following the decision of this Court on the instant motion. Petitioner requests oral argument on this motion.

Respectfully submitted,

* * *

Filed OCT. 24, 1963

**ORDER FOR DISTRIBUTION BY TITLE COMPANY
OF FUNDS WITHHELD TO PAY REAL ESTATE
TAXES**

This cause having come before the Court on the motion of Arthur Investment Company, Inc. (Petitioner) that an order be entered herein directing Lawyers Title Insurance Corporation of Richmond, Virginia, to pay to Petitioner certain funds withheld from Petitioner and held in escrow for payment of real estate taxes allegedly due the District of Columbia on Lots C, 804 and 829 in Square 378 in the District of Columbia, which property was formerly owned by Petitioner and was taken in condemnation by the United States of America on August 6, 1963; and it appearing to the Court, after consideration of the motion and the objections thereto, that Petitioner should not be liable for taxes upon the said property except for the period when such property was under its control and available for its use; and further, it appearing to the Court that the issue in this proceeding is the same as that in District Court Docket No. 29-63, involving Petitioners Samuel Sussman and Etta Sussman, it is by the Court this 24th day of October, 1963,

ORDERED, ADJUDGED, AND DECREED that Lawyers Title Insurance Corporation of Richmond, Virginia, be and it is hereby authorized and directed to pay to the District of Columbia 16.7 ⁰/₁₀₀ of the taxes assessed for the period July 1, 1963, to June 30, 1964, on Lots C, 804 and 829 in Square 378 in the District of Columbia, and that the District

of Columbia shall accept payment of said sum in full satisfaction and discharge of District of Columbia taxes assessed for the period July 1, 1963, to June 30, 1964, on Lots C, 804 and 829 in Square 378, and any liens on the award in condemnation relative to such taxes; and it is

FURTHER ORDERED that Lawyers Title Insurance Corporation of Richmond, Virginia, be and it is hereby authorized and directed to deposit into the Registry of the Court the remaining 83.3 % of the funds withheld by that company from Petitioner for payment of taxes allegedly due to the District of Columbia on Lots C, 804, and 829 in Square 378 for the period July 1, 1963, to June 30, 1964, said funds to be held in the Registry of the Court until the time for the District of Columbia to appeal this order shall have lapsed without an appeal being taken, in which event said funds shall be paid by the Clerk of the Court to Petitioner Arthur Investment Company, Inc., or until such time as this Order shall have been finally disposed of upon appeal; provided that in the event Petitioner's right to all or any portion of said funds so deposited shall be upheld on appeal or if no appeal is taken, the District of Columbia shall pay to Petitioner Arthur Investment Company, Inc. interest on the funds to which they shall be found entitled at the rate of 6 % per annum from the date said funds are deposited into the Registry of the Court until released and paid to said Petitioner; and it is

FURTHER ORDERED that no penalties or interest for non-payment of said taxes when due shall be assessed by the District of Columbia for the period while the matter of said taxes is pending before this Court or on appeal, and that Lawyers Title Insurance Corporation of Richmond, Virginia, be and it is hereby authorized and directed to pay to Petitioner Arthur Investment Company, Inc., the funds withheld by said title insurance company for payment of such penalties or interest.

/s/ Edward A. Tamm
JUDGE

* * *

NOTICE OF APPEAL

Filed NOV. 5, 1963

Notice is hereby given this 5th day of November, 1963, that the District of Columbia, a municipal corporation, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from an order of this Court entered on the 24th day of October, 1963, entitled "ORDER FOR DISTRIBUTION BY TITLE COMPANY OF FUNDS WITHHELD TO PAY REAL ESTATE TAXES", in favor of Arthur Investment Company, Inc. (Petitioner), and against the District of Columbia.

* * *

** ** *

DISTRICT COURT DOCKET NO. 31-63

DATE	PROCEEDINGS
1963	
8/6	Complaint, jury action; Exhibits A & C
8/6	Declaration of taking; Ex "A"
9/3	Petition of Arthur Investment Co., Inc., a District of Columbia corporation for payment of money as to Par. 2
9/5	Paid \$292,600 to Arthur Investment Co., Inc., by Registry check # 3794 (Par. 2)
9/27	Motion of Arthur Investment Co., Inc., for payment of funds withheld to pay real estate taxes, or for order declaring a portion of such withheld funds as constituting an element to be considered in fixing just compensation
10/3	Answer of Plff. to motion of Deft. Arthur Investment Co., Inc., for payment of funds withheld to pay real estate taxes or for an order declaring a portion of such withheld funds as constituting an element to be considered in fixing just compensation.
10/7	Memo of Plff. in opposition to motion for payment of funds
10/10	Supplemental statement of P & A of Plff. in support of motion for payment of funds withheld to pay real estate taxes or for an order declaring, etc.
10/24	Order for distribution by Title Co. of funds withheld to pay real estate taxes Tamm, J.
11/5	Notice of appeal of District of Columbia, copy mailed to Charles Bechhoefer, 918 16th St., N.W., Anthony C. Liotta, U.S. Ct. House, Ronald E. Madsen, Southern Bldg.
11/14	Deposited into Registry \$2,009.99 by the Lawyers Title Ins. Corp. of Richmond, Va. pursuant to order of Court filed 10/24/63

BRIEF FOR APPELLEES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,275

DISTRICT OF COLUMBIA,

APPELLANT,

v.

SAMUEL SUSSMAN, ET AL.,

APPELLEES.

No. 18,276

DISTRICT OF COLUMBIA,

APPELLANT,

v.

ARTHUR INVESTMENT COMPANY, INC.

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

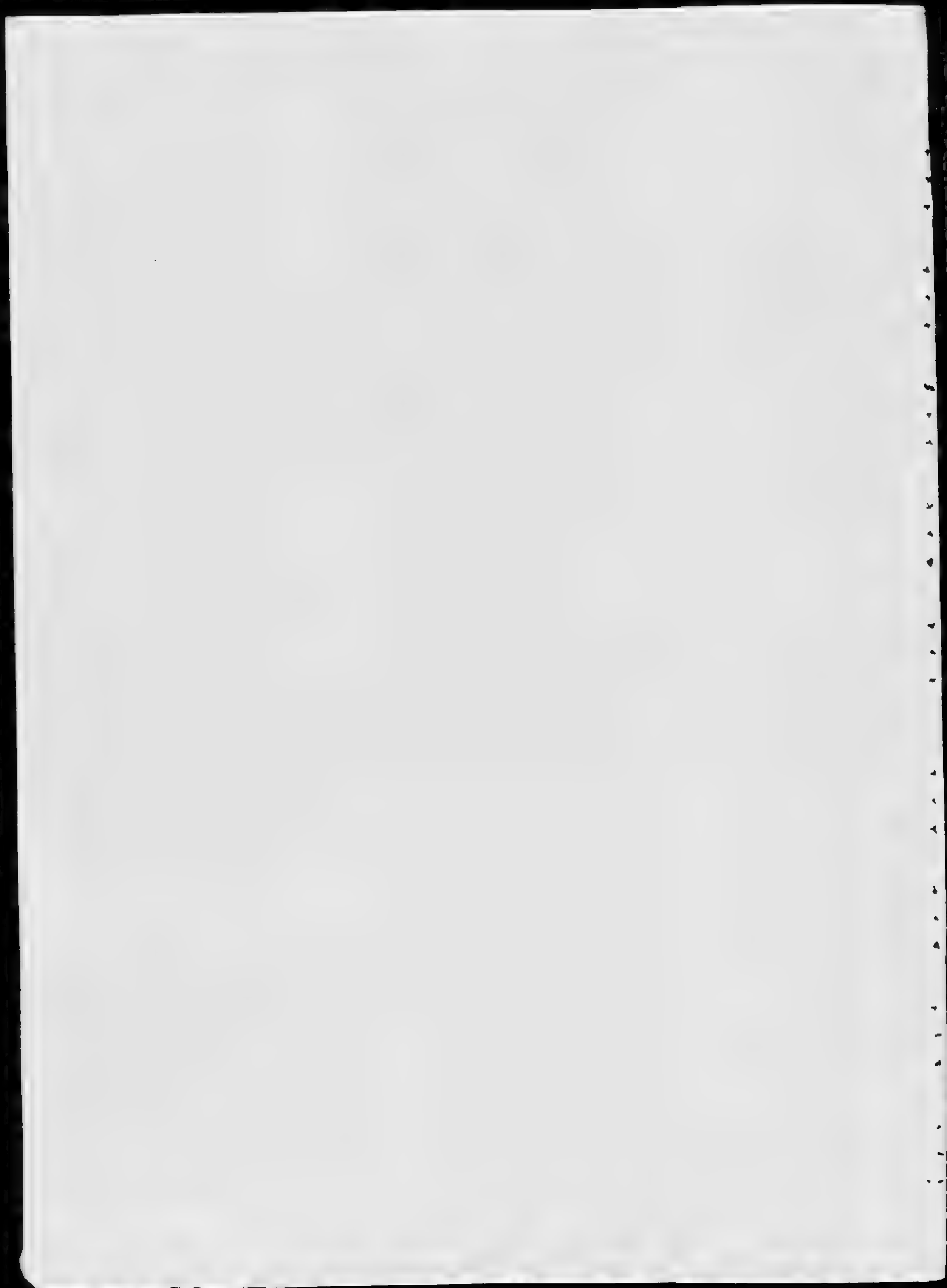
United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 20 1964

Nathan J. Paulson
CLERK

HENRY H. BRYLAWSKI
Attorney for Appellees Samuel and
Etta Sussman
224 East Capitol Street
Washington, D. C.

CHARLES BECHHOEFER
Attorney for Appellee Arthur
Investment Company, Inc.
World Center Building
Washington, D. C.



RESTATEMENT OF QUESTIONS PRESENTED

Appellees restate the questions presented by appellant as follows:

1. Is ~~not~~ the District entitled, out of the proceeds of condemnation, to payment in full of the amount of real property taxes assessed against the property ^{not} but delinquent or otherwise required to be paid at the time of the taking?
2. May the Court properly order the District to pay to the owners of the property condemned interest upon such amount in the Court's registry as may finally be determined not to be payable to the District?
3. If the District may properly be required to pay interest on the amount referred to in Question 2, is not the proper rate the same as would be required to be paid if additional compensation were awarded under the condemnation statute?
4. Was it not within the discretion of the District Court to prohibit the District of Columbia from charging interest on taxes which that Court has found not to be due?

In addition to the questions presented by appellants the following additional questions are deemed to be present by appellees:

1. Where privately owned property in the District of Columbia is taken by the Federal Government in condemnation subsequent to the beginning of the District of Columbia real estate tax year, but before any installment or portion of real estate taxes are due and payable, may the District Court properly order payment of real estate taxes to the District of Columbia to be made proportionately to the period of the tax year which occurred prior to the date of condemnation?
2. If not, is the District of Columbia entitled to any payment for real estate taxes?



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,)	
)	
APPELLANT,)	
)	
v)	No. 18,275
)	
SAMUEL SUSSMAN, ET AL.,)	
)	
APPELLEES)	
DISTRICT OF COLUMBIA,)	
)	
APPELLANT)	
)	
v)	No. 18,276
)	
ARTHUR INVESTMENT COMPANY,)	
INC.)	
APPELLEE)	

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

1. AS TO APPELLEES SAMUEL AND ETTA SUSSMAN

Appellees Samuel and Etta Sussman were the owners of Lot 814 in Square 379 in the District of Columbia, which property was taken in condemnation by the United States of America pursuant to declaration filed on July 26, 1963. On August 2, 1963, appellees filed a petition to require that a deposit in the amount of \$200,000 which had been made in the Registry of Court by the United States as estimated compensation be paid to the petitioners.

Pursuant to this petition an order was entered on August 9, 1963, requiring the Clerk of the Court to draw a check to the order of appellees and deliver the check to Lawyers Title and Insurance Corporation with instructions to the title company to:

"apply the proceeds of said check to the payment of all taxes and assessments, due or exigible on said real property at the date of said declaration of taking, and to the redemption of all tax sales, if any, on said real property and to the payment and discharge of all liens and encumbrances of whatsoever nature on said real property, after which the balance, if any, shall be paid by said title company to the parties entitled thereto;"

Real estate taxes for the property for the entire fiscal year of 1964 would have been in the amount of \$2,905. The title company withheld from its payment to appellees the sum of \$3000 and held the said sum in escrow pending a determination as to the amount of taxes, if any, that appellees would be required to pay. Subsequent thereto appellees filed a motion to require the title company to pay over to them the sum so held. After submission of memorandums by the parties and oral arguments of the motion before Judge Tamm of the United States District Court for the District of Columbia, Judge Tamm filed a memorandum opinion on October 1, 1963, in which he stated:

"The Court is of the opinion that the position of the District of Columbia in this case is an unfair and inequitable one. The Court feels that the property owners in this, or any similar case, should not be responsible for taxes upon their property except for the period when it was under their control and when their properties were available for their use.

"The Court will, accordingly, direct that the title company release to the petitioners Samuel Sussman and Etta Sussman

the funds held by that company, in escrow, subject only insofar as District of Columbia taxes are concerned to a withholding of 8.33% of the taxes assessed for the period from July 1, 1963 to June 30, 1964. This computation is based upon the fact that date of taking under the condemnation order was July 26, 1963."

Thereafter on October 8th, Judge Tamm entered an order pursuant to his memorandum opinion. On October 16th the order of October 8th was vacated on oral motion and, at the request of the District of Columbia, there was substituted an amended order which directed that the funds previously ordered to be released to appellees be held in the Registry of the Court pending disposition of this appeal. It is from this order that the District of Columbia has appealed.

2. AS TO APPELLEE ARTHUR INVESTMENT CO., INC.

Arthur Investment Co., Inc. was the owner of Lots C, 804 and 829 in Square 378, which property was also taken in condemnation by the United States pursuant to declaration filed on August 6, 1963. The steps outlined in the Sussman case, 1 above, were followed with respect to Arthur Investment Co., Inc. The posture of the two cases is identical in all respects except as to the amount involved. On October 24th Judge Tamm entered an order which was substantially the same as the amended order entered in the Sussman case except as to the percentage and amount of taxes being held in the Registry of the Court.

ADDITIONAL STATUTE INVOLVED

D. C. Code 1961

Sec. 16-628 (cited in part only by appellant)

"The petitioner may file in the cause, with the petitioner or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto-

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing of said declaration of taking and of the deposit in the Registry of the Court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the registry. No sum so paid into the registry shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the registry of the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands or any parcel thereof shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

SUMMARY OF ARGUMENT

The District Court's orders of August 9 and August 30, 1963, did not have the effect of requiring payment to the District of Columbia of taxes for the entire fiscal year 1964. The words "due or exigible" did not require such a result and, even if they did, there was no restriction upon the court which would prevent it from amending or clarifying its own order. This is even more true whether the terms of the Court orders in question were not litigated and were not considered by the parties with reference to their applicability to real estate taxes. Even if the words "due or exigible" were still controlling they would be applied, with respect to taxes, only to those taxes which were due, payable, and demandable on the day of taking. The taxes involved were not due, payable, and demandable until after that date.

If the decision in this case must turn on whether or not the District of Columbia possessed a lien for taxes on the date of taking, then the District of Columbia is entitled to no taxes since tax liens arise in the District of Columbia only after a delinquency in payment and there was no delinquency on that date.

Allowance of interest on the funds held in escrow, in the event of a decision in favor of appellees, is within the discretion of the court and is in accord and consistent with the condemnation statute. Allowing the District of Columbia to collect penalty and interest in the event that real estate taxes are found to be payable would be unjust and inequitable particularly when appellants petitioned for a judicial determination of their tax status

before any delinquency occurred and after their funds had been held in escrow for payment of taxes.

Finally, the District Court's orders for proportioned payment of taxes was within the wide latitude granted to the court by the condemnation statute which authorized it to make such orders with respect to taxes as are just and equitable.

ARGUMENT

(Note: Headings I, II and II of appellees' argument are directed in answer to appellant's arguments bearing the same numerals. Heading IV covers a new point)

I. THE DISTRICT COURT'S ORDER OF AUGUST 9 and 30, 1963 DID NOT HAVE THE EFFECT OF DIRECTING PAYMENT TO THE DISTRICT OF COLUMBIA OF THE ENTIRE AMOUNT OF REAL PROPERTY TAXES HEREIN INVOLVED.

To support the contention asserted in Par. I of its brief, appellant refers to the wording of the orders of August 9 and 30, 1963, (j. a., pages 4 & 20) in which the District Court ordered that before distribution by the Title Company to appellees, it should " -- apply the proceeds to the payment of all taxes and assessments due or exigible on said real property at the date of said declaration of taking -- " Particular emphasis is placed on the phrase "due or exigible".

Before discussing the meaning of these words it is well to examine the circumstances under which the orders of August 9 and 30, 1963, were written.

After the declaration of taking was filed by the United States both appellees routinely moved for release to them of sums deposited in the Registry of Court. (j. a., pages 6 & 22) These petitions resulted in the

orders of August 9 and 30th. They were ex parte proceedings insofar as District of Columbia was concerned. The District was not served with copies of the petition or order nor did it seek to be heard in this posture of the case. The orders were prepared by appellees in conformance with other orders filed in similar cases, examples of which were supplied to appellees by attorneys of the Department of Justice. Appellees, in consenting to such orders, did not do so with reference to the problems arising in this proceeding, namely, the possible liability for real estate taxes applicable to periods of time after which the respective properties were no longer owned by appellees. The Department of Justice attorneys consented to the respective orders and these orders were signed by the Court without hearing.

Even if the words "due and exigible" do possess the meaning attributed to them by appellant it is of no moment. The District Court has inherent power to amend its own order. Having uttered these words the Court certainly was not estopped to clarify or modify them. This it can be said to have done in its memorandum of October 1, 1963 (j. a. page 12) and its subsequent orders of October 16 (j. a., page 13) in the Sussman case and October 24th in the Arthur Investment Case (j. a., page 26).

For this reason appellees feel reluctant to be drawn into a semantical debate as to meaning of words "due or exigible."

Appellees must state in passing, however, that in the context of the order and circumstances of the case the meanings of these words are clearly different from those ascribed to them by appellant. The word "due" has many meanings but when it is applied to financial obligations its

meaning is crystal clear. WEBSTER'S NEW INTERNATIONAL DICTIONARY, SECOND EDITION, G & C MERRIAM CO. defines it as follows: (meaning #6. Finance) "Having reached the date at which payment is required; payable; - said especially of a note or obligation in which the time for payment is specified". In defining the word "exigible" the same authority refers us to its definition of the word "exigent" which is "Exacting or requiring immediate aid or action. Pressing. Critical."

None of the cases cited by appellant as to the meaning of the word "due" had to do with taxes due. When used with reference to real estate taxes, the word "due" or the language "due or exigible" refers to taxes where payment is required or requirable and which constitute a lien on the property. Drosd v. Boyle, 78 N.E. 2d 779; Crowell v. Harvey Inv. Co., 128 Cal. App. 241, 17 P. 2d 189.

The dictionary definitions of these words and the decided cases clearly do not support the meaning ascribed to them by appellant as applied under the circumstances of this case. Unless the context requires otherwise, words should be given their natural or ordinary meaning. Lake County v. Rollings Colo., 9 S. Ct. 651, 130 U.S. 622, 32 L. ED. 1090.

II. THE DISTRICT OF COLUMBIA LIEN FOR REAL ESTATE TAXES DID NOT ATTACH TO THE PROPERTY AT THE TIME OF ASSESSMENT.

Appellees, as they will subsequently brief under heading IV below do not believe it to be "just and equitable" (quoting the applicable phrase

in the pertinent statute, 16-628 D.C. Code), to decide the right of the District of Columbia to taxes for a whole year on property condemned by the U. S. early in the tax year on the basis of whether or not a tax lien had attached prior to taking. It seems consonant with the phrase "just and equitable" to decide as the lower Court did, that the District of Columbia is entitled to taxes pro rata to that portion of the year which the property was in the hands of the taxpayer. But if the date of the attachment of tax lien must be the critical point then it is res judicata in this jurisdiction that the tax lien of the District of Columbia does not attach until after occurrence of a tax delinquency. As is conceded, there was no tax delinquency in these cases at the time of taking.

The question of when the District of Columbia tax lien attaches seems to have been first discussed in the U.S. Court of Appeals for the Fourth Circuit. This was the case of Comm. of Int. Rev. vs. Rust's Estate, 116 F. 2d 636. The question was of importance in determining the taxability of decedent Rust's estate because if, when Rust had paid certain real estate taxes shortly after acquiring the property, a lien had already attached, the tax payments would have been part of the cost of acquisition and could not have been deducted as a business expense. The Court examined our statute and concluded that the tax lien of the District of Columbia did not attach until after a delinquency in payment occurred. Since there was no delinquency when Rust acquired the property, he was permitted his tax deduction.

The question arose in this court in Cobb v. U. S. 84 U.S. App. D.C. 228, 172 F. 2d 277. Although it was not a party to the suit, the District of Columbia appeared in this case as amicus curiae.

The question was one of priority between a Federal tax lien for income taxes and D. C. lien for real estate taxes. The dates of attachment of these respective liens was important. The Court adopted the view expressed in the Rust case and quoted the following language with approval:

"Since no reference is made in the statute to a lien for taxes except in connection with taxes in arrears, it is a reasonable interpretation that the lien does not arise prior to the occurrence of a delinquency."

The settled law in the District of Columbia as pronounced by this Court is, therefore, that a lien for taxes does not attach to real estate until the period established for payment on taxes has passed and taxes are in arrears. In the present cases the dates of taking were in July and August of 1963. Taxes for the fiscal year commencing July 1st are payable in accordance with 47-1209 D.C. Code which provides in part:

"Real estate taxes and personal taxes of all kinds shall hereafter be payable semiannually in equal instalments in the months of September and March."

Since the tax arrearage for fiscal 1964 would not occur until October 1, 1963, on the dates of the taking of these properties there were no liens for taxes.

The time when a tax becomes due and payable, under a statute does not necessarily fix the time when it becomes a lien. Westhus v. Univ. Trust Co. of St. Louis, 164 F.795; Comm. of Int. Rev. v. Rust's Estate, supra. Taxes are liens only when and to the extent so made as by statute. Dist. of Col. vs. Hechinger Properties Co. D.C. Court of Appeals, 197 A. 2d 157.

"There is a fundamental underlying legal distinction between the establishment of the tax and the creation of a lien upon the property." U.S. v. Certain Lands in the Borough of Brooklyn, 41 F. Supp. 51.

It seems unnecessary to brief the subject further. Appellant relies upon U. S. v. Three Parcels of Land in Woodbury County, Iowa, 198 F. Supp. 529. There, after examination of the Iowa statute and Iowa cases, a District Court declared that under Iowa law real estate taxes become liens on date of tax levy. It is difficult to see how a District Court case from another jurisdiction interpreting laws of that jurisdiction in a case which was not reviewed by the Circuit Court of Appeals, could not overturn laws established for District of Columbia by our own Court of Appeals not to mention the Fourth Circuit. Furthermore, the statutes interpreted are by no means identical, Sec. 445.28 of the Iowa Code, 58 I.C.A., specifically spells out the imposition of a lien against real estate for taxes. We have no parallel provision in our Code.

Other Courts in examining and construing other local statutes have found that tax liens attached on a day subsequent to that of taking as is the case here. See U.S. vs. Certain Lands in the Borough of Brooklyn; Supra; People of Puerto Rico vs. U.S., 131 F. 2d 151. But it is obvious that the date a lien for taxes attaches is determined by examining the local statutes and local decisions and not decisions construing other statutes in other jurisdictions. That determination having been made by the Court in the Cobb case the matter need not be further explored. Apparently it is the position of the District of

Columbia that, if there were no lien attached to property at the time of Federal taking, there would be no right in the part of the taxing authority to payment of any taxes. If this is the law, then the District Court must lose all and the lower court should not have apportioned any taxes in the District's favor.

Ordinarily, it is of no moment to the taxing authority when a tax lien attaches since the lien follows the land and must be paid off eventually by the owner, if a tax sale is to be avoided. It is for this reason that taxes are normally adjusted between buyer and seller in arms length transaction. This is what the lower court attempted to accomplish. It was never intended by Congress in passing the laws relating to tax liens nor by the Courts in construing them that the date a lien attached should have special application in condemnation cases. Appellees do not think this should be the law in the District of Columbia and neither did the lower Court when it justly and equitably apportioned the taxes between the parties.

Appellees feel obliged, before leaving this point, to comment on the cases cited by appellant on pages 21 through 24 of its brief concerning the taxability of land where it is changed from a taxable to an exempt status during the tax year. Congregational Home vs. District of Columbia 92 U.S. App. D. C. 73, 202 F. 2d 808 and others.

These cases are inapplicable for two reasons. First, the question of a tax lien or its date of attachment was not even remotely involved in the cases. Second, the properties were at all times in the hands of the private owners. The principal question was:

Where land being used for charitable or religious purposes is removed from the tax rolls during a year, can the taxes be apportioned? The answer to this question did not result in a forfeiture, as the appellant asks for here, because at all times the land owners had full use of the land, whether or not they were required to pay taxes. The date of their tax exemption was the only problem involved.

III THE DISTRICT COURT'S ORDERS OF OCTOBER 16 AND OCTOBER 24 PROPERLY ORDERED PAYMENT OF INTEREST BY THE DISTRICT TO APPELLEES AND IMPROPERLY PROHIBITED THE DISTRICT FROM ASSESSING INTEREST.

In the Sussman case below the District Court ordered that with regard to the funds held in escrow:

"....in the event petitioners' right to all or any portion of said funds so deposited shall be upheld on appeal or if no appeal is taken, the District of Columbia shall pay to petitioners Samuel Sussman and Etta Sussman interest on the funds to which they shall be found entitled at the rate of 6% per annum from the date said funds are deposited into the Registry of the Court until released and paid to said petitioners;

"FURTHER ORDERED that no penalty or interest for nonpayment of said taxes when due shall be assessed by the District of Columbia for the period the matter of said taxes is pending before the Court."

A similar order was entered in the Arthur Investment Co. case. (J. A. pages 28 & 29).

Award of interest to appellees, should their position be upheld in this appeal was within the discretion of the trial court and was authorized by statute.

It should be pointed out that in the first order of Court entered in the Sussman appeal there was no provision for deposit in the registry of the court. The now escrowed money was in that order awarded to appellees outright. It was only after the request made by the District of Columbia at oral hearing that this order was amended to provide for escrow. Appellant should not be heard to protest allowance of interest to appellees on appellees' money when it is only through appellant's own request that the money is in escrow and not already in appellee's possession.

The funds in escrow are part of awards to the owners of condemned property. Sec. 16-628, D.C. Code 1961, provides that there shall be included as a part of just compensation in such awards interest at the rate of 6% per annum from date of taking. It is true that no interest is permitted on sums voluntarily paid by the United States into the Registry of Court but a method for quick withdrawal of such deposits is provided for. Such quick withdrawal was accomplished on application of the owners and it is solely due to the request of appellant that sums were required to be redeposited in the Registry of Court. It is consistent with spirit of the condemnation statute for the District Court to allow as just compensation interest on such portion of these funds as are determined to be the rightful property of appellees.

The restriction against the imposition of interest because of non-payment of taxes, in the event the District Court is reversed, is eminently fair and correct. These taxes would not have been

delinquent until October 1, 1963. In both cases below a sufficient amount to pay real estate taxes was placed in escrow well before date of delinquency and appellees' motions to release funds from escrow were filed before delinquency. (J. A. 6-8, 22-25). Appellees did all within their power to cause a determination of their tax liability before delinquency. It may be noted that the lower Court's decision initially was on the application of the appellees. Appellant made no affirmative move to cause the funds being held by the Title Company to be released.

Certainly when appellees did all within their power to effect a determination of their tax liability before a delinquency occurred it would be inequitable to penalize them for non payment. Particularly is this so when, as here, the greater period of delinquency would be caused by the time consumed in the prosecution of appellant's appeal.

IV THE APPORTIONMENT OF REAL ESTATE TAXES ORDERED BY THE COURT WAS WITHIN THE DISCRETION GRANTED BY STATUTE TO MAKE SUCH ORDERS WITH RESPECT TO TAXES AS ARE JUST AND EQUITABLE.

If, as argued by appellant, it is necessary to determine this appeal on the question of the date when a tax lien attached in the District of Columbia then, as briefed in II above, appellees should prevail. But appellees submit that it is not fair to bottom the Court's decision on an irrelevant date which was not established either by statute or construction of court with this situation in mind. Although it is not part of the record in this case, appellee's ask the Court of

Appeals to take judicial notice that the condemnation cases in these appeals are two of a large number of condemnation cases entered in suits initiated by the Department of Justice to provide land for a proposed new FBI Building. These condemnation suits are numbered District Court Nos. 19 - 63 through Nos. 32 - 63 in the United States District Court for the District of Columbia.

Of these, Nos. 19 through 23 were filed just prior to July 1st and 24 through 32 were filed shortly after July 1st. Thus, if the District of Columbia's position is correct, owners of the land taken in June in Case Nos. 19 through 23 pay no taxes beyond June 30, 1963, whereas owners of land taken only a few days later are required to pay an additional year's taxes. Even the Assistant Corporation Counsel, who argued the decisive motion in the Court below, admitted the unfairness of his own position as evidenced by the colloquy below: (J.A. pages 7-10)

"THE COURT: As a practical consideration, isn't this rather unfair to the property owner?

MR. McCALLY: Yes, it is, Your Honor. There is no question about that.

THE COURT: I assume that there is no allowance in the amount paid for the, shall we say, accrued taxes in the sense that they run through the current year. The award does not include an allowance for those taxes as a practical matter, or are you prepared to comment on it?

MR. McCALLY: Yes. Not specifically as such but when an award is made, we take this position, Your Honor: that the United States Government, or the District, in condemning expects to receive a fee simple title and in considering this award, everything is considered, the amount for the land and whatever is necessary to give that title to the Government.

"MR. McCALLY (contd.)

Now, I realize that normally speaking, taxes are adjusted. We have had condemnation cases in which the tax has been put in evidence and it has been considered. But, I don't know what the jury considers when they decide on the award.

We do take the position that we expect to get the land and fee simple and in doing that, it includes taking care of whatever outstanding liens and encumbrances, or anything else, are on it.

* * * * *

While it is true that this rule is harsh, we feel that the District Court ordered the taxes to be paid. It was an encumbrance; they were due. I believe the cases which I have cited deal specifically with the question of proration. Since there be no proration of taxes, the United States Government fully protected itself here by requiring that all taxes due and all encumbrances be paid, and I think the order of the Court, Your Honor, should be upheld in this case."

Certainly this admittedly harsh result should be avoided if it is within the power of the court to do so. Appellees feel it is possible to make a fair decision as to taxes without having to depend upon the entirely fortuitous and irrevelant date of attachment of a tax lien.

Sec. 16-628, D.C. Code 1961, specifically provides that it is within the power of the Court to:

"...make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

The words "just and equitable" remove this section in the statute from one of strict limitation and lift it to the level of broad discretionary power. Appellees have attempted to determine whether Congress expressed any legislation intent which would serve as a guide in construction of this phrase. A perusal of

the accompanying Committee reports is of no assistance.^{1/}

Since there was no legislative purpose announced, we must presume that the Congress intended that these words be used in their ordinary and normal meaning. U.S. v. Stewart, 61 S. Ct. 102, 311 U. S. 60, 85 L. ed. 40.

It is persuasive to note that Congress has provided that when land in the District of Columbia returned to private hands after government ownership, the new owner need only pay District of Columbia real estate taxes for that proportional period of the tax year in which the land is held by the new owner. Sec. 47-409, D. C. Code 1961.

In many cases just compensation for condemnation of property has been defined to be that which a willing buyer would theoretically pay a willing seller. U.S. vs. Buxton Lines, 165 F. 2d 993. In others the rule is stated to be "He (the owner) is entitled to be put in as good a position pecuniarily as if his property had not been taken". U.S. v. Virginia Electric & Power, 81 S. Ct. 784, 365 U.S. 624, 5 L. Ed. 2d 838.

To accomplish these objectives the court surely can recog-

^{1/} 16-628-D.C. Code, March 1, 1929, 45 Stat. 1418 Ch. 416 S. 11, H.R. 13461, Public No. 867, 70th Congress, Session II, House Report 1693, Volume 8838; Senate Report 1431, volume 8977.

Identical language is found in a subsequently enacted U. S. Statute covering condemnation in all places other than in the District of Columbia. The Committee reports accompanying this statute are also silent as to this phrase. 40 U.S.C. 258a, Feb. 26, 1931, 46 Stat. 1421, Ch. 307, S. 1, HR 14255, Public No. 736, 71st Congress, Session III, House Report 2086, Volume 9326, Senate Report 1325, Volume 9323.

nize that willing buyers and willing sellers customarily adjust taxes in accordance with their respective periods of ownership. The court must also recognize that to require an owner to pay a whole year's taxes when his use was for a fractional period manifestly does not place him in as good a position pecuniarily as if his property had not been taken.

Apparently the Federal Government cannot make allowances for taxes in its awards even though tax liens might have accrued. Washington Water Power Co. vs. U.S. 135 F. 2d 541. See also the remarks of Anthony J. Liotta, Department of Justice attorney at the hearing of the motion in the case (J. A. pages 10 & 11). The solution for the inequity must be sought elsewhere.

Interestingly enough, the District of Columbia itself, when taking land in condemnation, apparently does not adhere to the harsh rule that it now urges on the Court. The Assistant Corporation Counsel who argued for the District of Columbia acknowledged this when he admitted to the Court that normally taxes are adjusted and that the District of Columbia has had condemnation cases in which the amount of taxes payable has been put in evidence and considered by the jury. (J. A. page 9).

It is certainly unjust and inequitable for the District of Columbia to urge as it does a difficult and more harsh position with respect to Federal taking than it takes in its own condemnations.

The term "equitable" (in a statute) adds the element of fairness. Ohio Edison v. McElrath, 137 N.E. 2d 642.

"Equitable" is defined as meaning according to natural right or natural justice; marked by due consideration of what is fair, unbiased or impartial, U.S. v. 11,360 Acres of Land, etc., 62 F. Supp. 968.

The phrase "just and equitable" in the condemnation statute of New York City has been construed and given an extremely liberal interpretation. In the case of #Petition of Gillespie et al, 32 N. Y. S. 2d 96, an electrical supply corporation whose lines were displaced because of condemnation was by application of this phrase compensated not only for cost of relocating the lines but also for the extra cost of maintaining lines in more circuitous locations.

The word "just" as used in this phrase must carry with it the meanings attributed to that word as used in the 5th Amendment to the Constitution of the United States which prohibits the taking of private land for public use without just compensation. The word "just" in the Fifth Amendment evokes ideas of "fairness" and "equity". U. S. v. Commodities Trading Corp. 70 S. Ct. 547, 339 U.S. 121, 94 L. Ed. 707, U. S. vs. Virginia Electric & Power, supra.

With the meaning of this phrase in mind, the lower court had no difficulty in ruling that the real estate taxes in question should be apportioned. That was the just and equitable solution. There is no other.

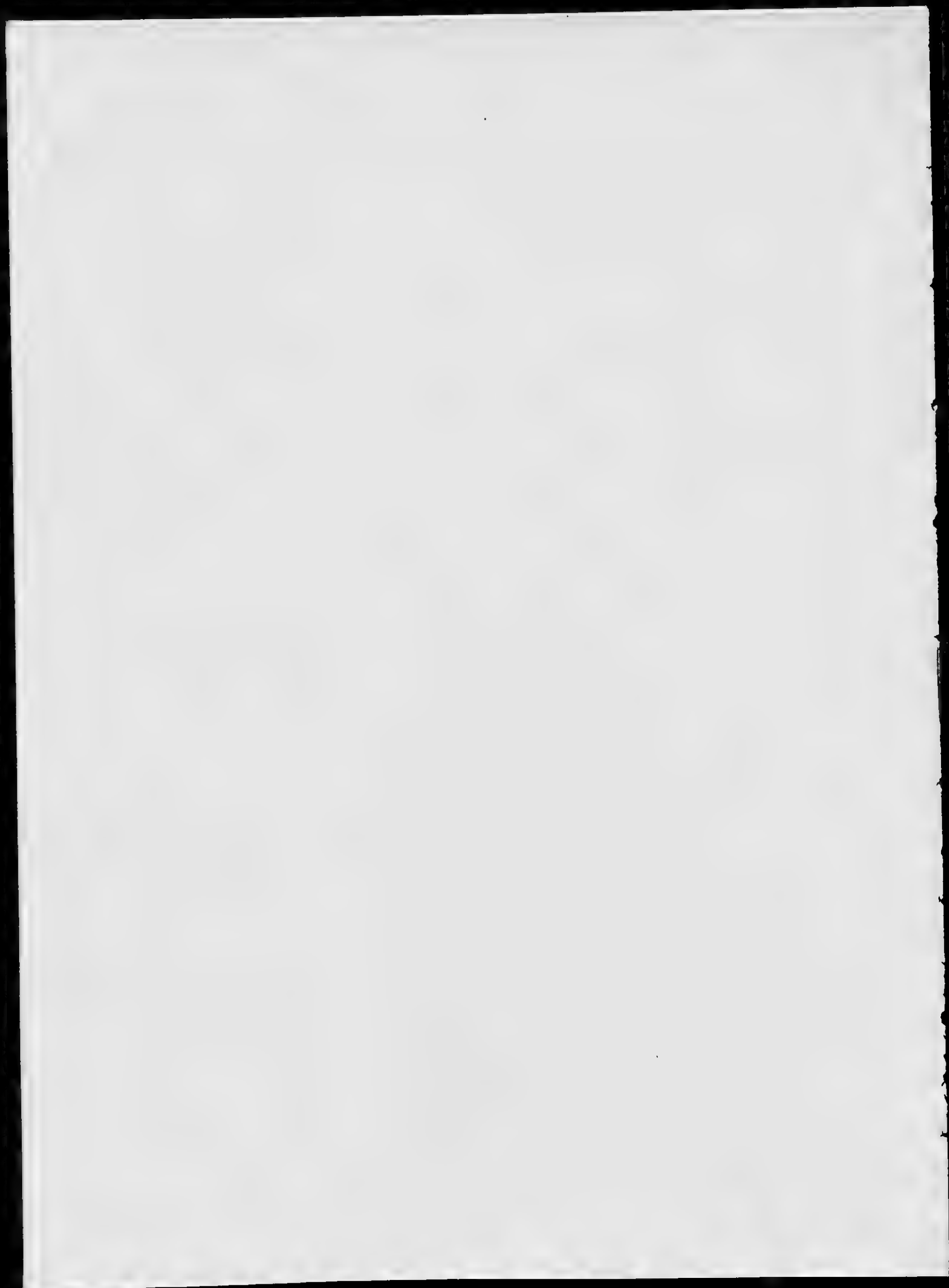
CONCLUSION

For all of the reasons stated above, the District of Columbia's Orders of October 16th and October 24th should be affirmed.

Respectfully submitted,

Henry H. Brylawski
Attorney for Appellees
Samuel and Etta Sussman

Charles Bechhoefer
Attorney for Appellee Arthur
Investment Co., Inc.



OPPOSITION OF APPELLEES TO MOTION OF
UNITED STATES FOR AMENDMENT OF ORDER OF REMAND

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,275

DISTRICT OF COLUMBIA,

Appellant

v.

SAMUEL SUSSMAN, ET AL.,

Appellees

No. 18,276

DISTRICT OF COLUMBIA,

Appellant

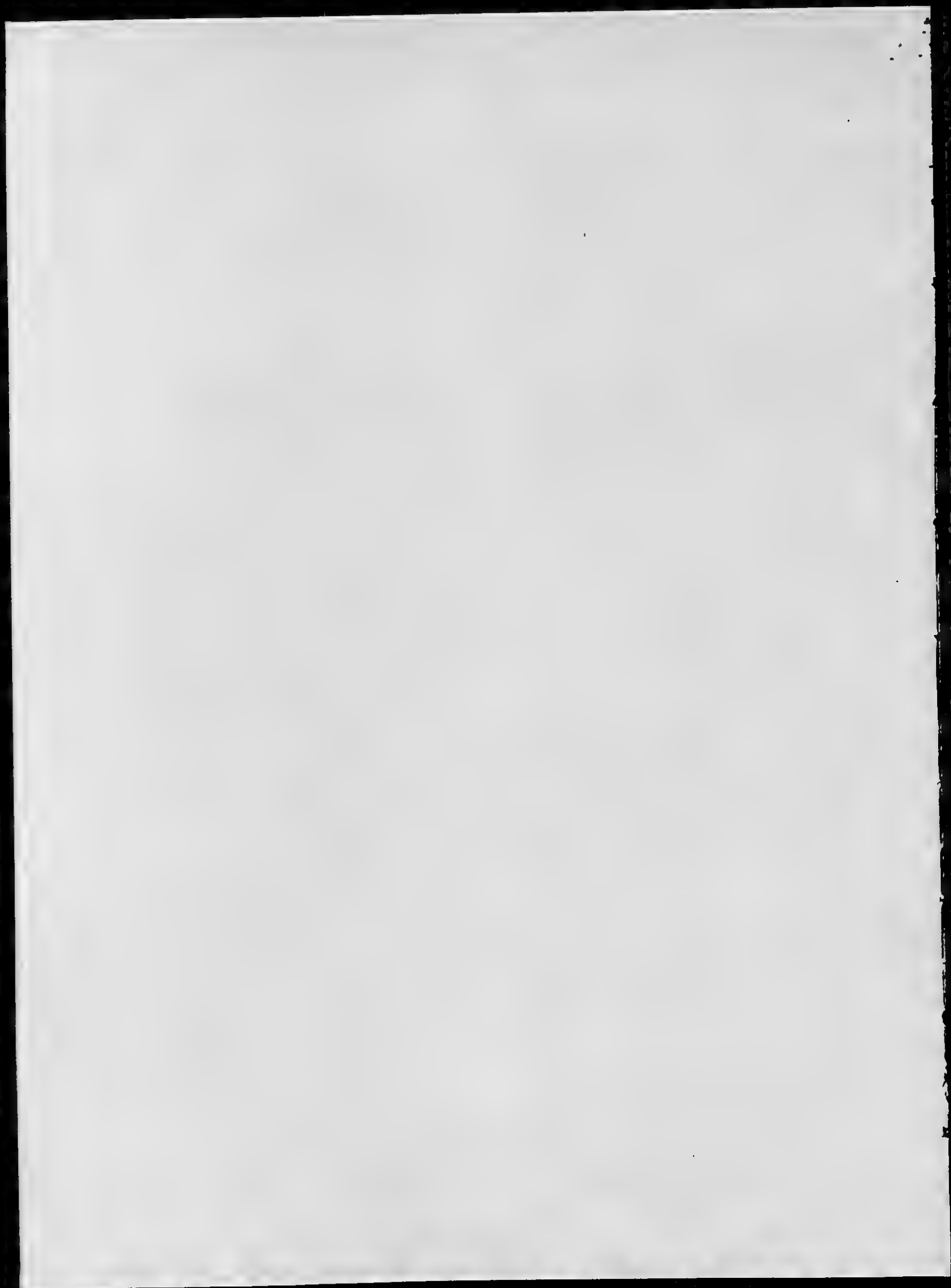
v.

ARTHUR INVESTMENT CO., INC., ET AL.,

Appellees

*Appeal From the United States District Court
for the District of Columbia*

HENRY H. BRYLAWSKI
224 East Capitol Street
Washington, D. C.
Attorney for Appellees



OPPOSITION OF APPELLEES TO MOTION OF UNITED
STATES FOR AMENDMENT OF ORDER OF REMAND

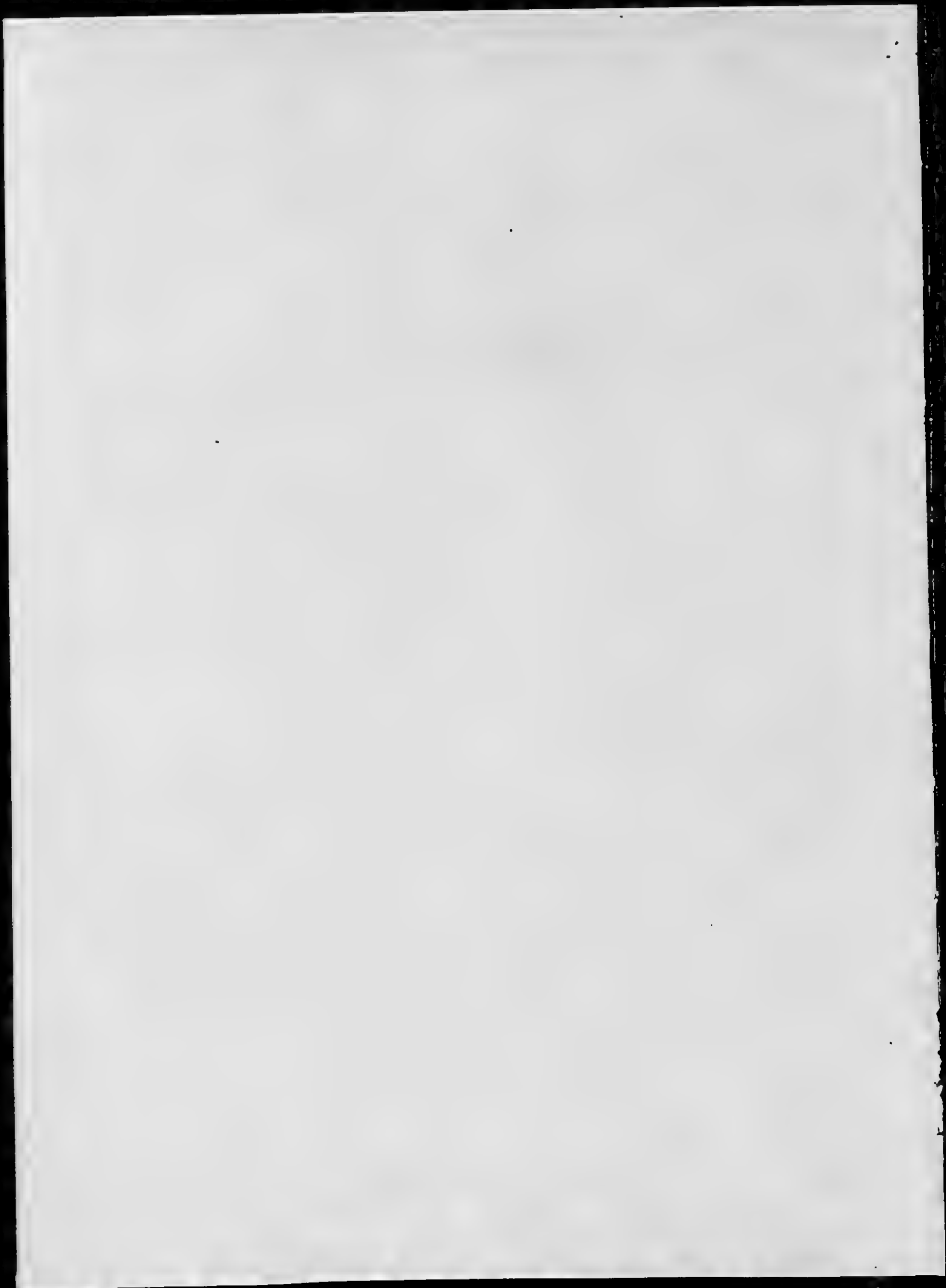
The United States has now filed a motion asking that the order of remand in this case be amended to provide:

"nothing herein contained shall be construed as authorizing entry of judgment against the United States either directly or indirectly because of tax liability for the year 1964."

As grounds for such amendment the United States asserts an admission by the District of Columbia that the United States was not a party to the action. Therefore, says the United States, no judgment can be entered against it.

If such an admission can be drawn from the arguments of the District of Columbia, it does not bind appellees. Appellees have never admitted or argued that the United States is not a proper party to this action. It should be remembered that the appeal is from an order in a condemnation suit in which the United States was the plaintiff. (United States of America vs Certain Land in the City of Washington, et al. District Court No. 29-63)

It is true that the first skirmish in the battle on the question of who should bear the burden of payment of taxes claimed as due by the District of Columbia was fought between these appellees and the District of Columbia but, as in the case of so many other local conflicts, the United States was drawn into the war and is now a necessary party. In the present posture of the case not only has the United States the right to petition for rehearing but also the right, which it now exercises to file appropriate motions.



This it could not do if it were not a party. The motion is, therefore, on its face a repudiation of the alleged admission upon which it is based.

Accordingly, while recognizing the right of the United States to file the motion, appellees urge that it be denied.

Respectfully submitted,

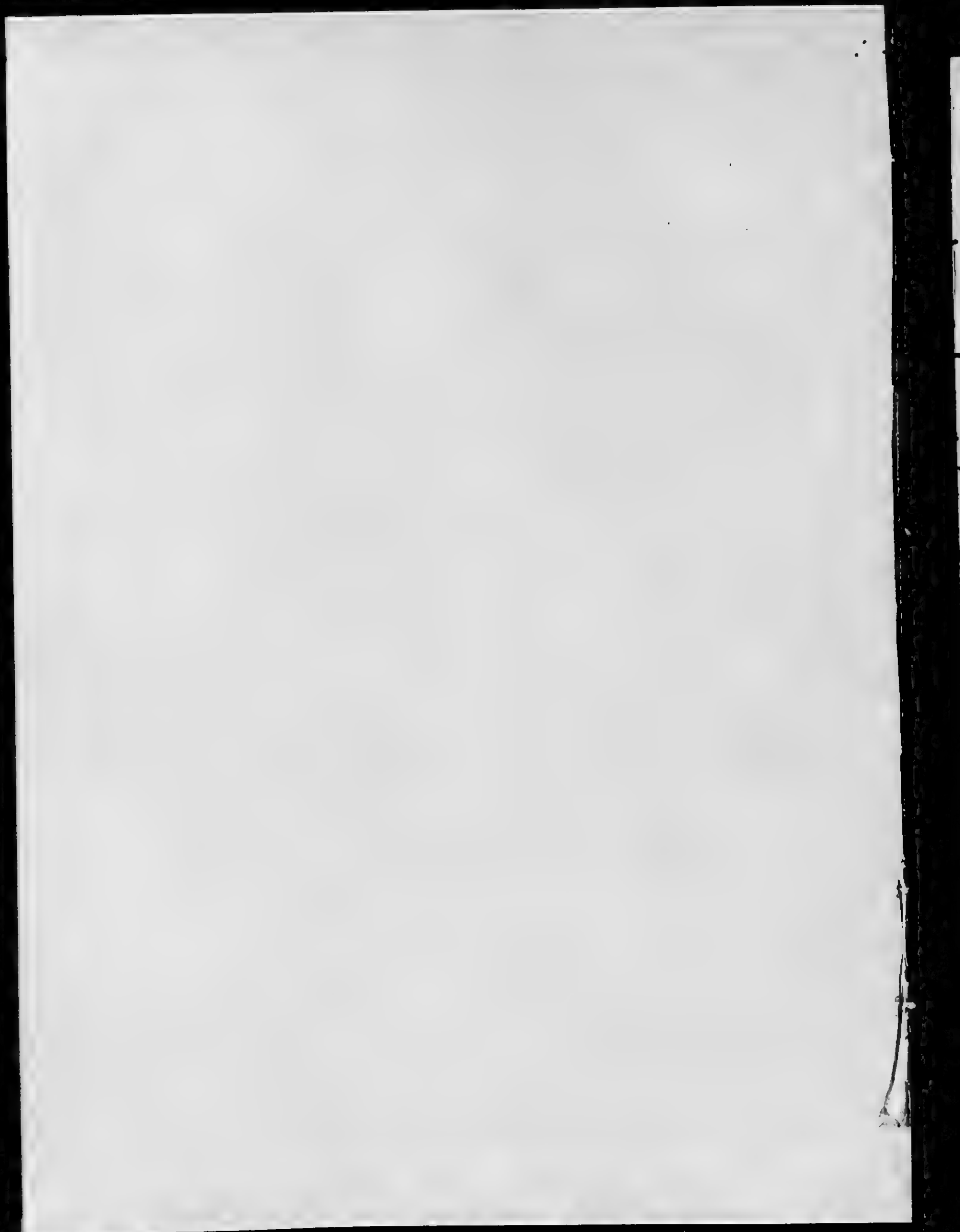
Henry H Brylawski
224 East Capitol Street
Washington, D. C. 20003

Attorney for appellees

CERTIFICATE OF SERVICE

I certify that copies of the foregoing opposition were mailed to the Corporation Counsel of the District of Columbia and to Roger Q. Marquis, attorney, Department of Justice this 20th day of September, 1965.

Henry H Brylawski



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RESPONSE OF THE UNITED STATES TO OPPOSITION
TO PETITION OF THE UNITED STATES FOR REHEARING
AND SUGGESTION THAT REHEARING BE HAD EN BANC
AND MOTION FOR AMENDMENT OF ORDER OF REMAND
IN ACCORDANCE WITH ADMISSIONS OF APPELLANT

UNITED STATES COURT OF APPEALS United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT for the District of Columbia Circuit

FILED NOV 9 1965

No. 18,275

DISTRICT OF COLUMBIA, APPELLANT

Nathan J. Paulson
CLERK

v.

SAMUEL SUSSMAN, ET AL., APPELLEES

No. 18,276

DISTRICT OF COLUMBIA, APPELLANT

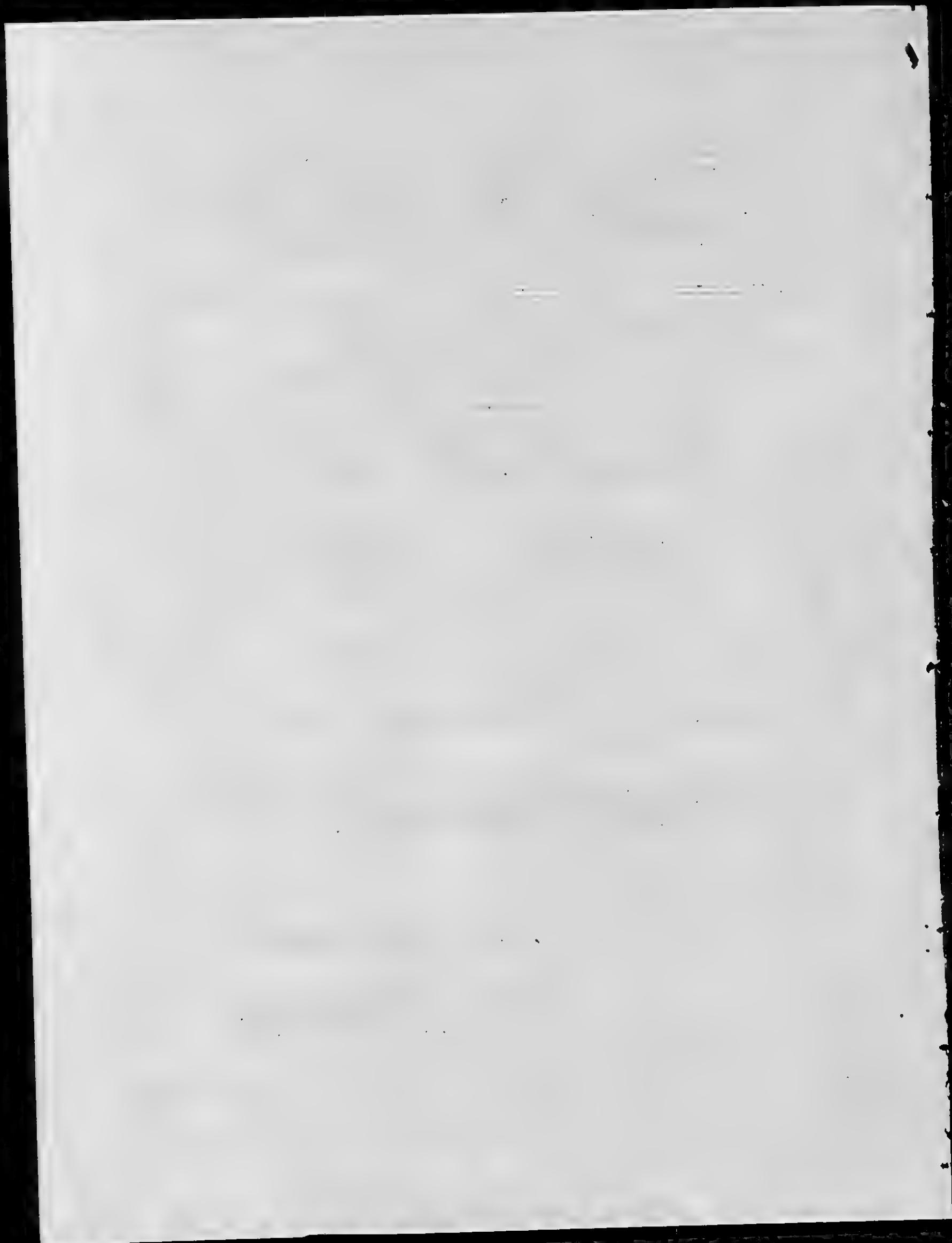
v.

ARTHUR INVESTMENT CO., INC., ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,275

DISTRICT OF COLUMBIA, APPELLANT

v.

SAMUEL SUSSMAN, ET AL., APPELLEES

No. 18,276

DISTRICT OF COLUMBIA, APPELLANT

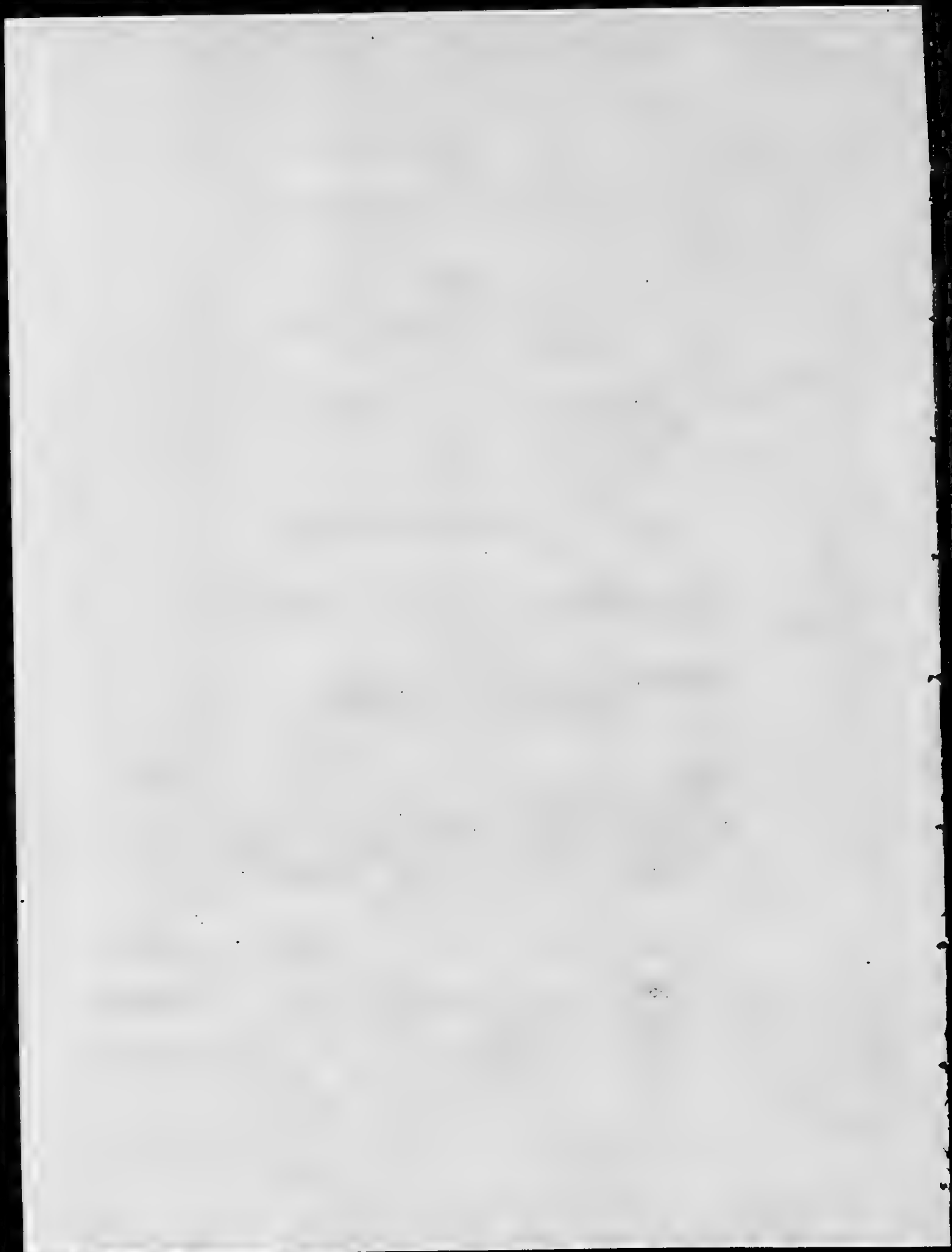
v.

ARTHUR INVESTMENT CO., INC., ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RESPONSE OF THE UNITED STATES TO OPPOSITION
TO PETITION OF THE UNITED STATES FOR REHEARING
AND SUGGESTION THAT REHEARING BE HAD EN BANC
AND MOTION FOR AMENDMENT OF ORDER OF REMAND
IN ACCORDANCE WITH ADMISSIONS OF APPELLANT

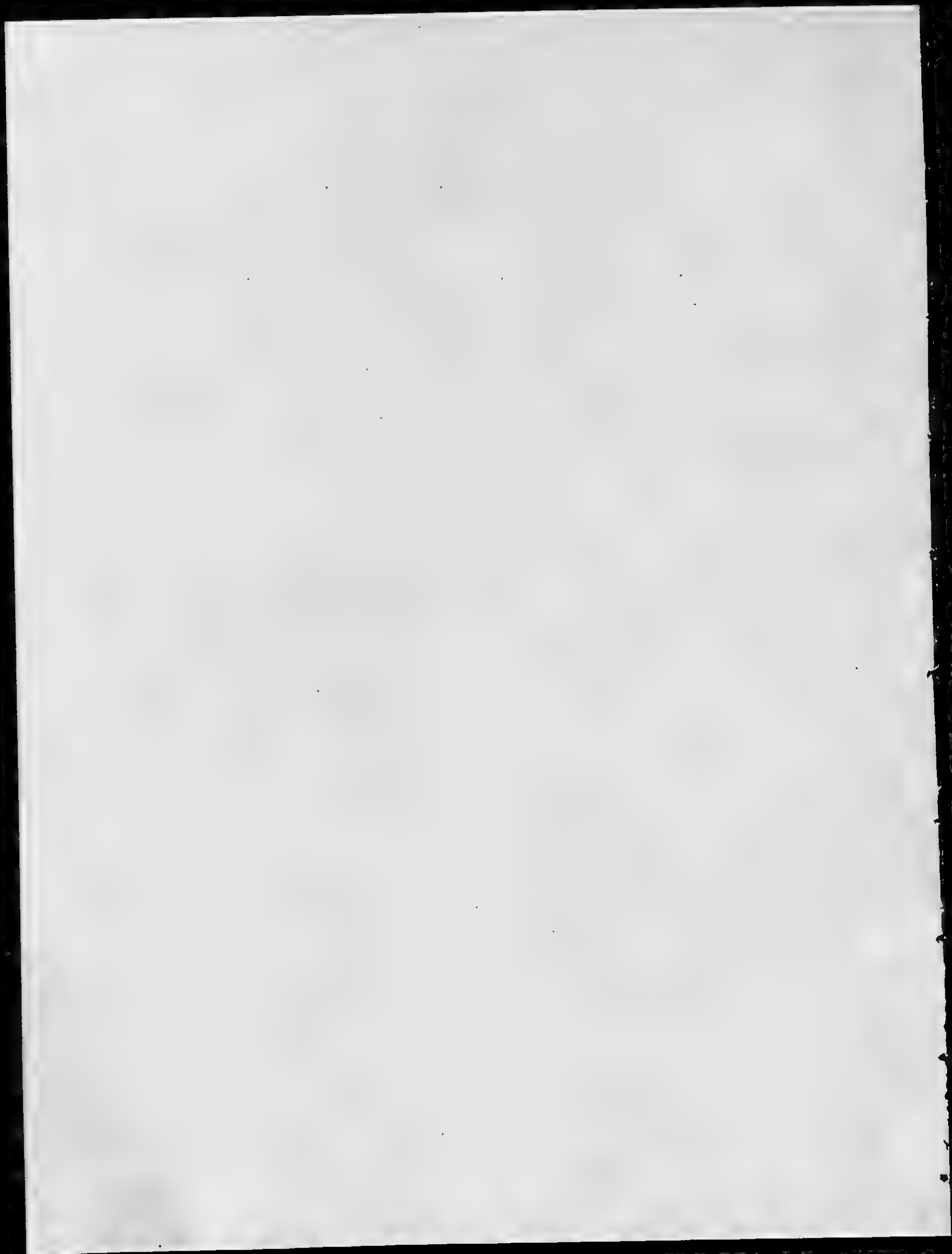
The United States of America, in reply to appellant's
opposition filed September 10, 1965, and received by the United
States September 14, 1965, and in view of its admissions therein,



moves this Court to amend its order of remand to provide "nothing herein contained shall be construed as authorizing entry of judgment against the United States either directly or indirectly because of tax liability for the year 1964."

The District says that it alone appealed, and that the United States was not a party to the action "to determine the amount of real property tax due to the District by the appellees." It refers to the memorandum by the United States filed in this Court, concludes that that action was not an application to intervene, and says the United States at no time sought to intervene. It concludes therefrom that the United States "has no legal standing to file a petition for a rehearing en banc."

Basic principles of fair judicial trial require that a party be given a hearing before judgment is entered against it. By the District's own admission the United States was never a party to the trial court proceedings or in this Court. It follows that no judgment can be entered against it.



CONCLUSION

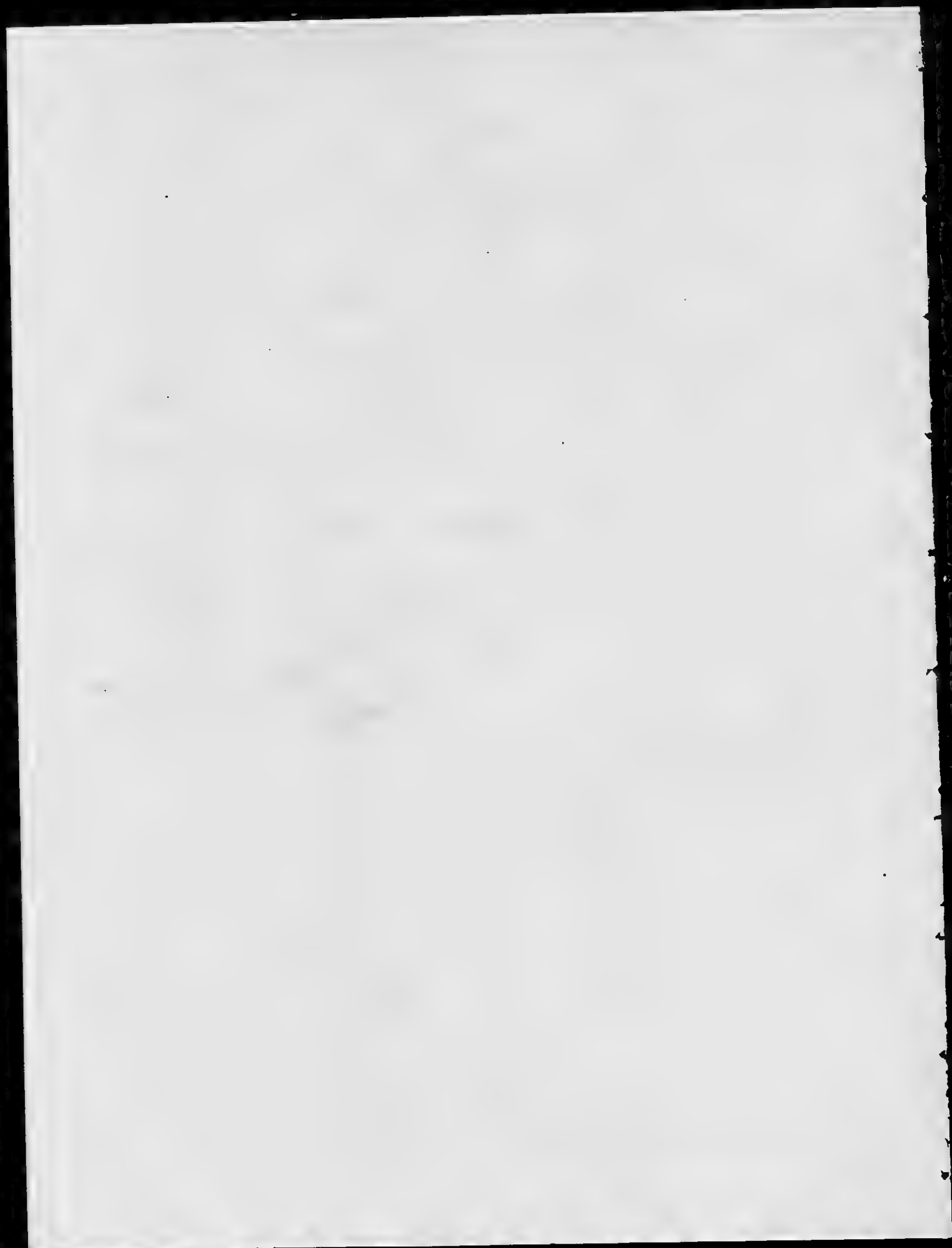
It is submitted that the order of remand should be amended to state: "nothing herein contained shall be construed as authorizing entry of judgment against the United States either directly or indirectly because of tax liability for the year 1964."

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.

SEPTEMBER 1965



OPPOSITION TO PETITION OF APPELLEES FOR REHEARING
AND FOR REHEARING EN BANC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 18, 275

FILED OCT 4 1965

DISTRICT OF COLUMBIA,
Appellant,

Nathan J. Paulson
CLERK

v.

SAMUEL SUSSMAN, ET AL.,
Appellees.

No. 18, 276

DISTRICT OF COLUMBIA,
Appellant,

v.

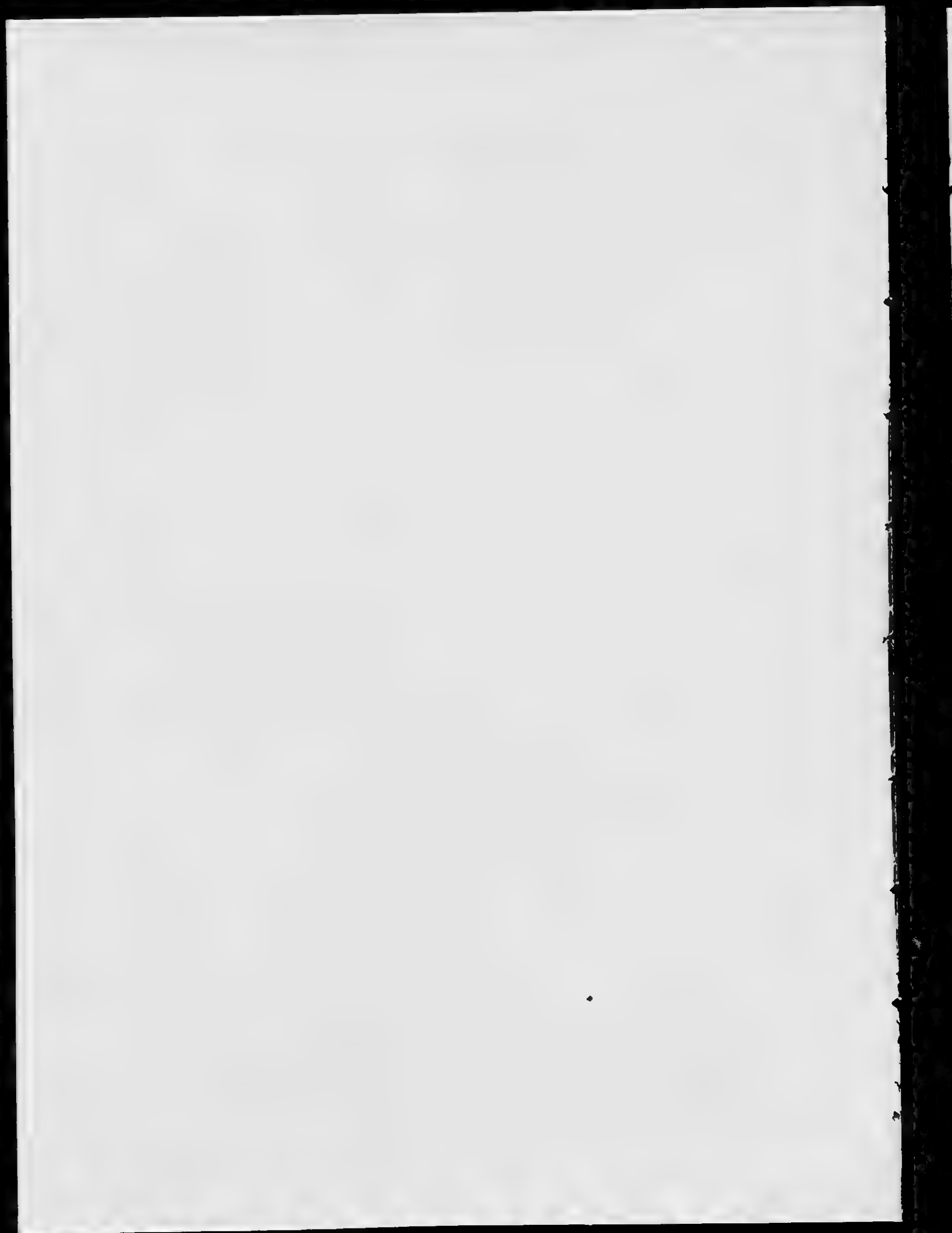
ARTHUR INVESTMENT CO., INC., ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHESTER H. GRAY
Corporation Counsel, D.C.
MILTON D. KORMAN
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Attorneys for Appellant
District Building
Washington, D.C. 20004



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,)	
)	
Appellant,)	
)	
v.)	No. 18, 275
)	
SAMUEL SUSSMAN, ET AL.,)	
)	
Appellees.)	

DISTRICT OF COLUMBIA,)	
)	
Appellant,)	
)	
v.)	No. 18, 276
)	
ARTHUR INVESTMENT CO., INC., ET AL.,)	
)	
Appellees.)	

OPPOSITION TO PETITION OF APPELLEES FOR REHEARING
AND FOR REHEARING EN BANC

Appellees have petitioned the Court for rehearing en banc. For the reasons set forth below, the appellant, the District of Columbia, opposes the granting of the petition.

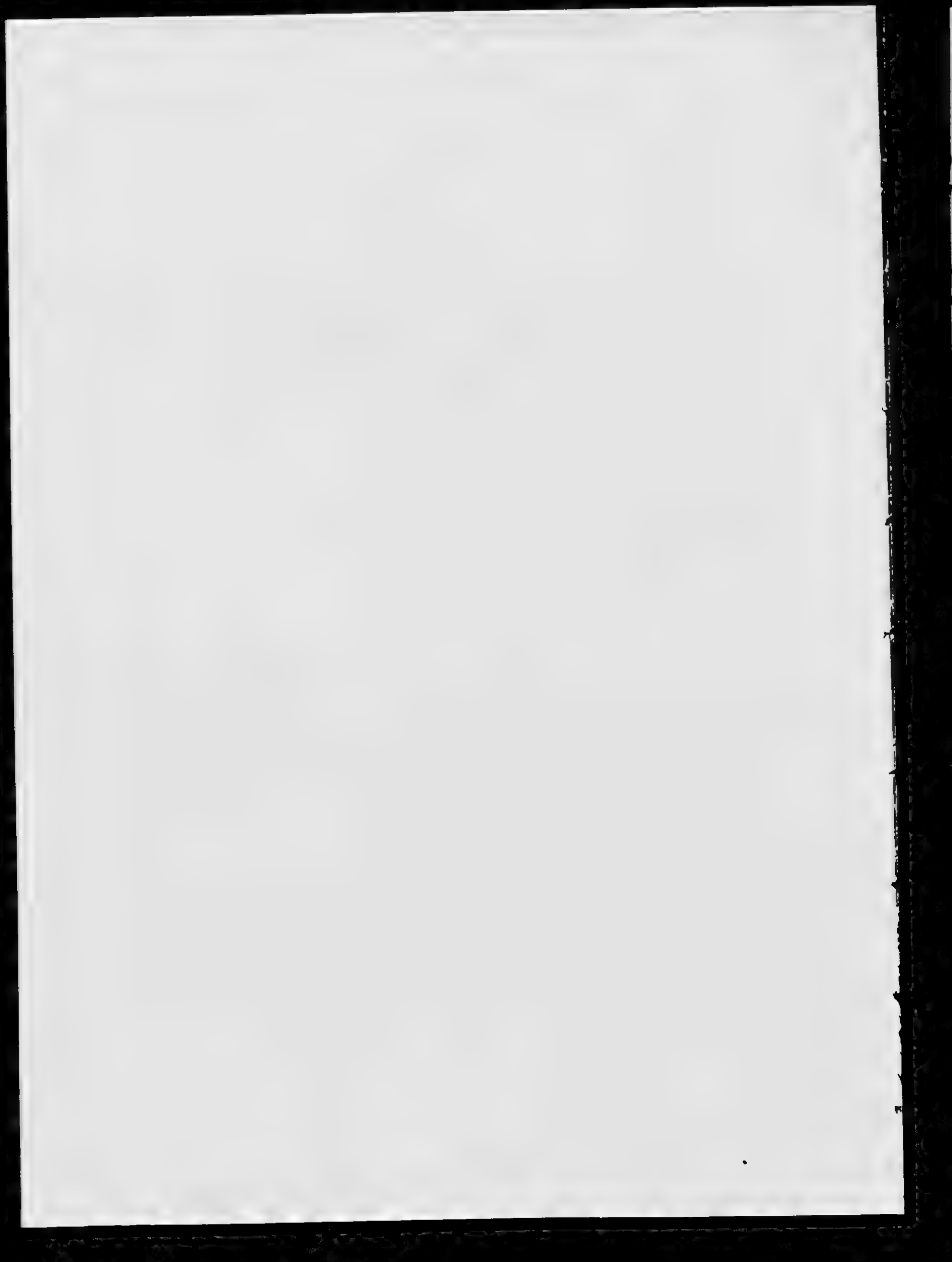
In accordance with Rule 31 of the General Rules of this Court, appellant, on April 23, 1964, filed a motion for a hearing en banc and pointed out therein that these cases are representative of a large number of others pending in the District Court which would be decided by the outcome of the appeal. On May 5, 1964, appellees filed opposition to

appellants' motion for a hearing en banc arguing that appellants' motion " * * * should be summarily denied because there are no circumstances here to warrant the Court departing from its usual practice of assigning a division consisting of three judges to hear and determine appeals." Appellees further stated "To grant appellants' motion would in fact be wasteful of judicial time and manpower, * * *." As a result, it was, on May 25, 1964,

"ORDERED by the court en banc that the aforesaid motion of the District of Columbia is hereby denied."

On July 26, 1965, Circuit Judge Carl H. McGowan and Chief Judge David L. Bazelon, constituting a majority of the Division of the Court before whom the case was heard, reversed the decision of the District Court. Judge McGowan and Chief Judge Bazelon both filed written opinions setting forth their reasons for the reversal. In a separate opinion, Circuit Judge Washington dissented.

Basically, appellees now seek to have the case completely reconsidered and redetermined notwithstanding that, as is evidenced by the majority opinion, the separate concurring opinion of Chief Judge Bazelon and the dissenting opinion of Judge Washington, the entire matter has been carefully considered by a Division of the Court. Moreover, as above stated, the Court considered en banc and denied an earlier motion by the District for such a hearing.



For these reasons, the appellant, the District of Columbia,
respectfully submits that appellees' petition should be denied.

CHESTER H. GRAY
Corporation Counsel, D.C.

MILTON D. KORMAN
Principal Assistant Corporation
Counsel, D.C.

HENRY E. WIXON
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OPPOSITION TO PETITION OF THE UNITED STATES FOR
REHEARING AND SUGGESTION THAT REHEARING BE HAD
EN BANC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT United States Court of Appeals
for the District of Columbia Circuit

No. 18, 275

FILED SEP 10 1965

Nathan J. Paulson
CLERK

DISTRICT OF COLUMBIA,
Appellant,

v.

SAMUEL SUSSMAN, ET AL.,
Appellees.

No. 18, 276

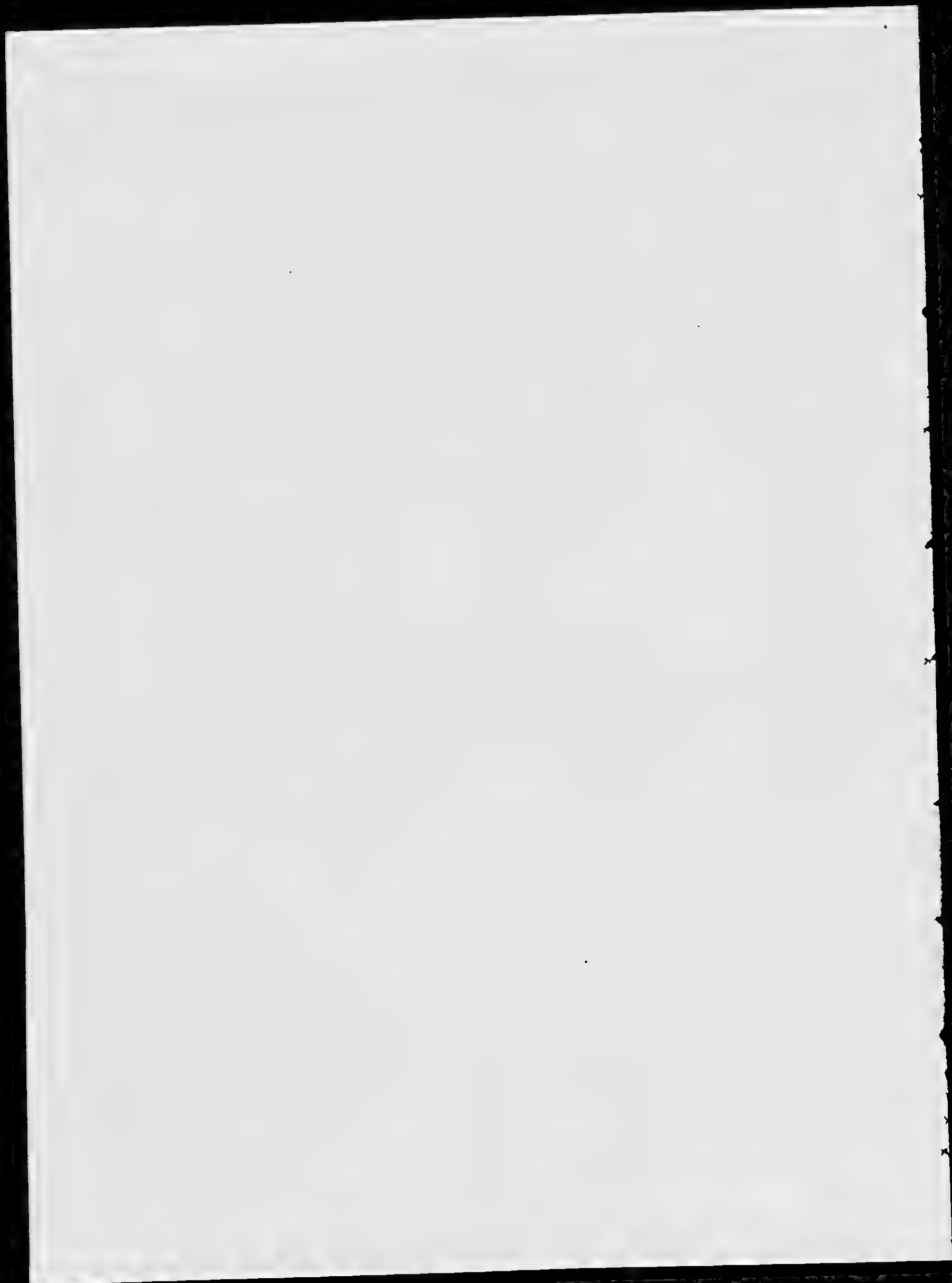
DISTRICT OF COLUMBIA,
Appellant,

v.

ARTHUR INVESTMENT CO., INC., ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHESTER H. GRAY
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

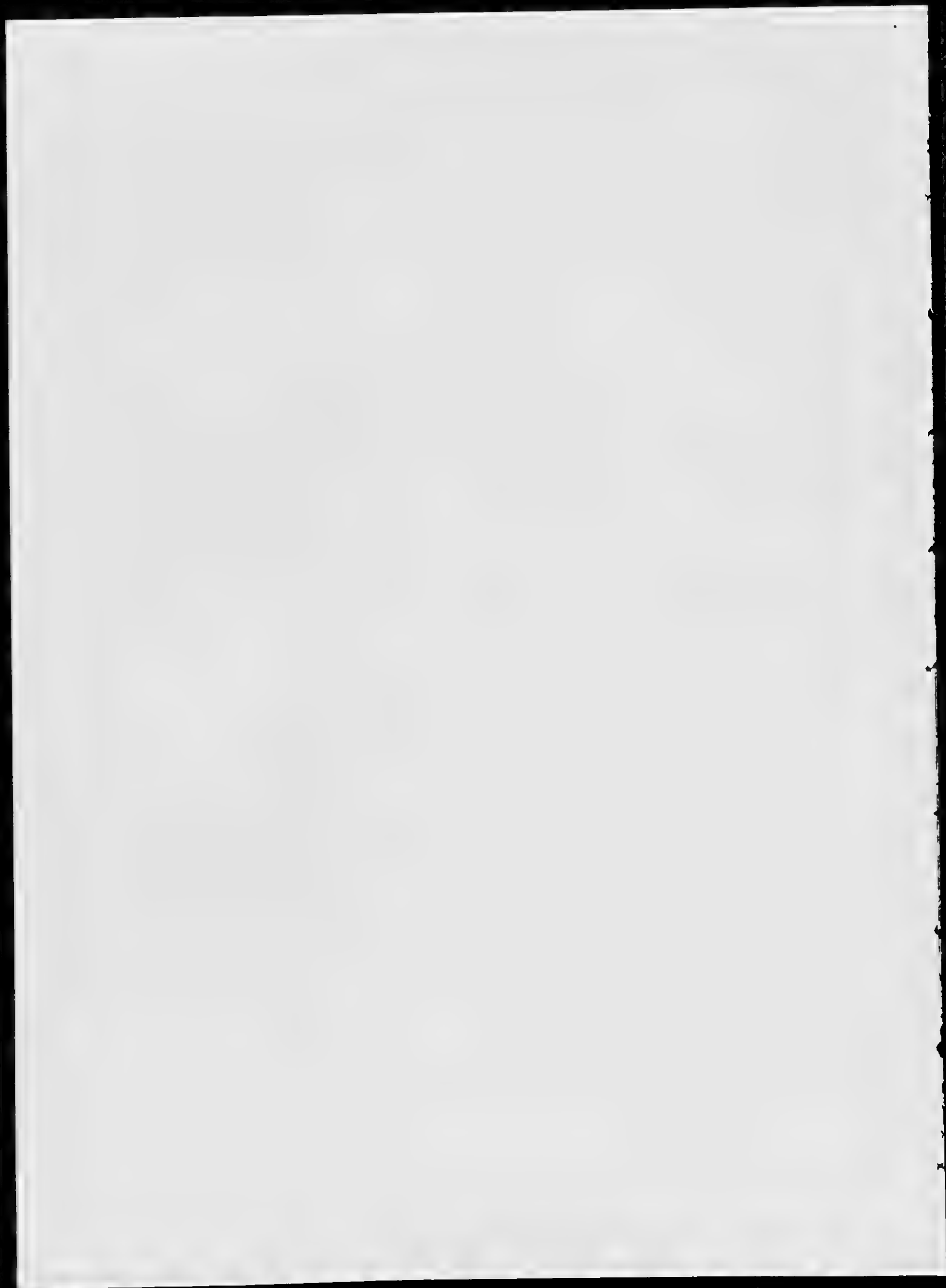
DISTRICT OF COLUMBIA,)	
)	
Appellant,)	
)	
v.)	No. 18, 275
)	
SAMUEL SUSSMAN, ET AL.,)	
)	
Appellees.)	

DISTRICT OF COLUMBIA,)	
)	
Appellant,)	
)	
v.)	No. 18, 276
)	
ARTHUR INVESTMENT CO., INC., ET AL.,)	
)	
Appellees.)	

OPPOSITION TO PETITION OF THE UNITED STATES FOR
REHEARING AND SUGGESTION THAT REHEARING BE HAD
EN BANC

The United States has petitioned the Court for a rehearing en banc. For the reasons set forth below, appellant, District of Columbia, opposes the granting of the petition of the United States.

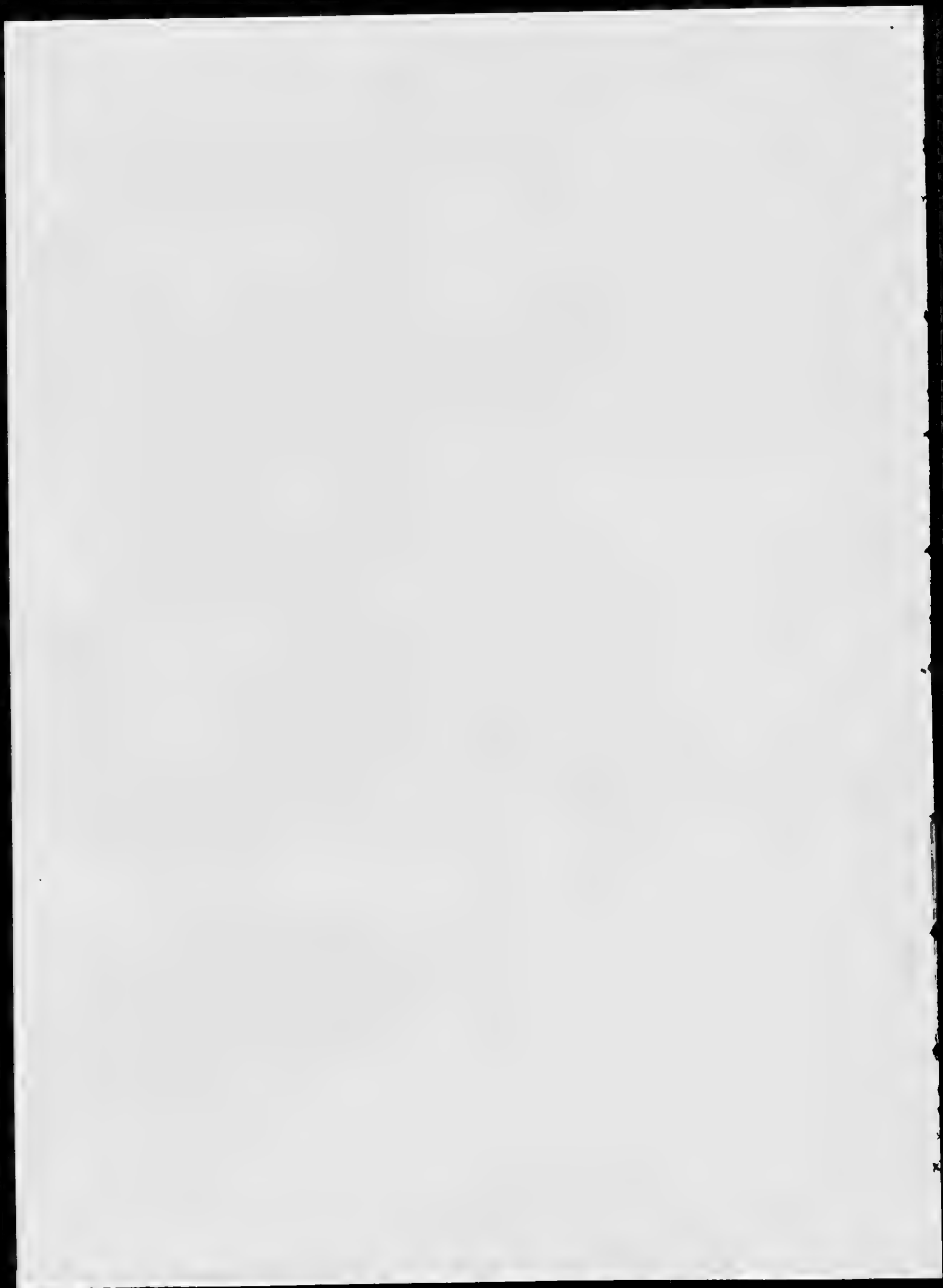
These consolidated cases arose as a consequence of the filing by the United States of America of declarations of taking of real property owned by the appellees in the District of Columbia. In each of the cases District of Columbia real property taxes for the fiscal year ending



June 30, 1964 had been assessed and were outstanding and unpaid. As a consequence of proceedings instituted by appellee Sussman seeking determination of the amount of real property tax payable to the District out of proceeds of condemnation, Judge Edward A. Tamm, then a judge of the United States District Court, on October 1, 1963, filed a memorandum opinion holding in substance that Sussman should be responsible for taxes on his property only for the period when it was under his control and available for his use. On October 16, 1962, he entered an order which, inter alia, directed the Lawyers Title Insurance Company to pay to the District out of the condemnation funds held by it in escrow 8.33 per cent of the real property taxes assessed against appellee Sussman's property for the fiscal year ending June 30, 1964.

Thereafter, on November 5, 1963, the District noted an appeal to this Court from the District Court's order of October 16, and also appealed an identical case involving property of appellee Arthur Investment Company. These cases were consolidated for briefing, the filing of a single joint appendix, and oral argument. It is important to note that it was the District, and the District alone, that appealed. The United States was not a party to the District Court action to determine the amount of real property tax due to the District by the appellees.

The District's brief and joint appendix were filed on February 18, 1964 and appellees' brief was filed on March 21, 1964.



On April 9, 1964 the United States filed a motion for leave to file a memorandum attached to its motion stating the position of the United States. The memorandum did no more than to set forth the position of the United States in this controversy. Neither it nor the motion to which it was attached was construed by the District as an application to intervene, nor was it, in the opinion of counsel for appellant, so construed by counsel for the appellees. Neither appellees nor appellant filed any objection to the motion. Other than the foregoing, the United States never filed with the Court any formal paper which could be construed as a motion or application to intervene, nor did it attempt to file herein a brief amicus curiae.

On March 23, 1964, appellant filed a motion for a hearing en banc and stated therein

"The District, in its appeals to this Court, has raised vital legal questions concerning real property taxation in the District as it relates to both Federal and District condemnation of real property within the District. ***"

Appellees opposed the District's motion and the Court, on May 27, 1964, denied the District's motion for an en banc hearing. The case was argued on October 19, 1964, and the Court's opinion was handed down July 26, 1965. Although the appeal procedure covered the lengthy period from November 5, 1963, to July 26, 1965, the United States at no time sought to intervene in the consolidated cases.



Belatedly, on August 9, 1965, almost two years after appellate proceedings commenced, the United States has come forward with a petition for a rehearing with the suggestion that, because of what it states are far-reaching consequences in the condemnation procedures of the federal government, the rehearing be en banc. Since it never at any time sought to intervene, the United States has, however, apparently overlooked the fact that it is not a proper party to this action. And, as stated before, it was not a party to the proceedings in the District Court.

A principal argument of the United States is that its rights have been adjudicated in a proceeding in which it was not entitled to receive notice (subparagraph 2, argument I, page 3 of the petition of the United States). While it is true that the United States was not entitled to receive notice, it was well aware of the District's appeal and of the issues involved. Indeed, it filed with the Court a written memorandum in which it outlined its position. The United States could at that time have sought to intervene as a party for any of the reasons which it has stated in its petition for rehearing en banc. The fact is, however, that the United States did not seek to intervene and, accordingly, is not now a proper party before Court and, without doubt, has no legal standing to file a petition for a rehearing en banc.



For the foregoing reasons, the District of Columbia respectfully submits that the petition of the United States seeking a rehearing en banc is not properly before the Court and should be denied.

CHESTER H. GRAY
Corporation Counsel, D.C.

MILTON D. KORMAN
Principal Assistant Corporation
Counsel, D.C.

HENRY E. WIXON
Assistant Corporation Counsel, D.C.

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PETITION OF APPELLEES FOR REHEARING AND FOR
REHEARING EN BANC ~~AND ANSWER TO PETITION OF~~
~~THE UNITED STATES OF AMERICA FOR REHEARING~~

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED AUG 20 1965

No. 18,275

Nathan J. Paulson
CLERK

DISTRICT OF COLUMBIA,

Appellant

v.

SAMUEL SUSSMAN, ET AL.,

Appellees

No. 18,276

DISTRICT OF COLUMBIA,

Appellant

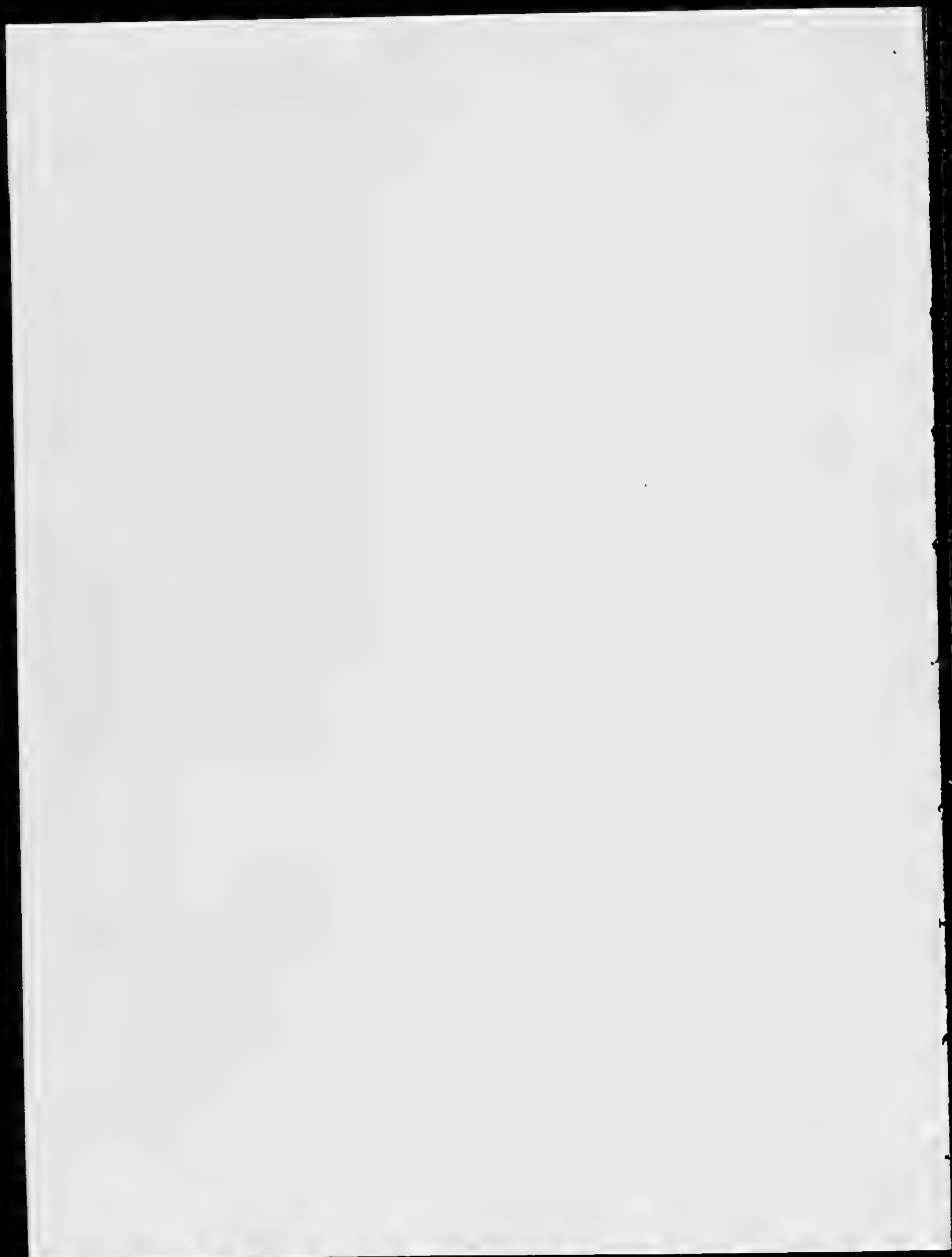
v.

ARTHUR INVESTMENT CO., INC., ET AL.,

Appellees

*Appeal From the United States District Court
for the District of Columbia*

HENRY H. BRYLAWSKI
224 East Capitol Street
Washington, D. C.
Attorney for Appellees



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,275

DISTRICT OF COLUMBIA,

Appellant

v.

SAMUEL SUSSMAN, ET AL.,

Appellees

No. 18,276

DISTRICT OF COLUMBIA,

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v.

ARTHUR INVESTMENT CO., INC., ET AL.,

Appellees

PETITION OF APPELLEES FOR REHEARING AND FOR REHEARING EN BANC

Appellees respectfully file this Petition for Rehearing and request that such hearing be held en banc. In support thereof appellees show as follows:

I

The Decision of the Court Was Based on a Point Which Was Not Briefed or Considered by the Parties to the Appeal and Which Is Contrary to Previously Established Law.

One of the principal points upon which the majority bases its opinion in this case involves a question not even considered by either party to the appeal. In all candor, appellees concede that their failure to brief the point was based on their apparently mistaken opinion that it was not germane to the case and that in any event the settled law is to the contrary.

This is the question of whether or not evidence of taxes for a period when a property owners' land is in the hands of the Government is admissible in evidence as damages to support the property owners' claim for compensation in condemnation. The division of this Court hearing the case says Yes, one judge dissenting. Appellee and the Federal Government thought the law was settled to the contrary. So apparently did the appellant since, as pointed out by Judge McGowan, it stated that the U.S. Government's memorandum stating its position on this subject "is not pertinent to the issues raised on this appeal."

The parties, including the U.S. Government which has filed its own Petition for Rehearing En Banc, should be given the opportunity of briefing and arguing this important question since its application affects them all so vitally. No case is cited which will support the new law herein announced. Judge McGowan's opinion states that the Court has discovered no case and knows of no reason why such evidence would not be admissible. Appellee has not had time to review again all of the cases which may touch on this subject. It did cite one, however, (page 19 Appellees brief) which certainly appears to hold to the contrary. This is *Washington Water Power Co. v. U.S.*, 135 F.2d 541. In that case the taxes had been levied in October and the condemnation oc-

curring in December of the same year. The jury was instructed by the lower Court to return a verdict which included compensation for the amount of taxes which had been levied prior to condemnation. The U.S. Court of Appeals (9th Circuit) held such an instruction to be in error. The Court said:

"The United States did not condemn the taxes or the lien therefor. It condemned the land. It is required to pay only just compensation for that land. The fact that the land may be subject to a lien has no bearing on the condemnation We think that while the United States is compelled to pay just compensation for the land, it cannot be compelled to pay the taxes."
(page 543)

At the argument in the District Court on the motion from which this appeal stems the very point came up and Anthony Liotta, Department of Justice Attorney, made the following statement:

"The Court: Does the United States desire to be heard in this matter?

"MR. LIOTTA: Yes, if I may.

"May it please the Court, as far as distribution in the case is concerned, the cases cited in our brief are ample to show that we really have no interest, no legal interest. However, I do feel that in the interest of the United States, I must make a statement to protect our interest in future condemnation cases.

"The first statement I would like to make is counsel for the District of Columbia, speaking probably for the District of Columbia itself in the conduct of condemnation cases, stated that the evidence as to taxes has been admitted into evidence. This is contrary to anything that has ever been done insofar as the federal cases are concerned. As a matter of fact, the Court on all occasions has instructed the jury to disregard and not even to attempt to find out what the tax assessment was as to the property.

"The United States maintains the position that any evidence as to taxes admitted into evidence would bring forth a motion probably for a mistrial." (Underlining added.)

Small wonder, then, that in their thinking and in their arguments the parties proceeded under the opinion that this point was firmly and finally decided to the contrary of that of the holding now made.

Appellee seeks the opportunity to brief and argue this point for what really amounts to the first time on appeal or even in the lower court.

II

The Court Holds That Appellees Are Entitled to the Relief Sought by Them Yet the Effect of the Decision Is To Deny Them That Relief

Appellee property owners sought relief from the burden of paying taxes for periods after land had been taken from them by condemnation. They thought that the District of Columbia, the taxing authority was the agency with which they were required to deal. So believing, they settled their claim against the Federal Government. (Even if their cases had been tried, they must admit they probably would not have pressed for the admission of tax expenses as damages against the United States.) Now the Court substantially tells appellees: You are entitled to relief but you seek it in the wrong manner against the wrong party. You may pursue your claim against the U. S. If, however, you have foreclosed yourself from such remedy (by settling) then you have acted at your peril. Thus the remedy offered to them by the Court is an empty one indeed. To say as the Court in effect did, "if you have settled, it's your own fault." is to impute to appellees an almost clairvoyant knowledge that for the first time it would be held that such taxes are a compensable item of damages. This appellees did not anticipate and neither did the other parties to the case which include the District of Columbia

and the Federal Government itself. It may be added that the many defendants in all of the condemnation cases that are in the same posture as these (that is the cases in which the Government condemned land for the proposed FBI Building after July 1, 1963) virtually all have settled with the Government without allowance for taxes. (See District Court Case Nos. 24 through 32) Indeed, if they had not done so, it is safe to say that there would have been no settlement.

This being so, it is respectfully urged that the court reconsider its opinion so as to give relief to these property owners, not just to those who may in the future profit by their "errors." This it can do under general, legal and equitable principals and under the specific statutory authority granted to the courts in condemnation cases.

III

The Need for Reconsideration of the Case Is Further Illustrated by the Fact That All Three Judges Who Heard It Found It Necessary To File Separate Opinions, One of Them Dissenting.

It is difficult to summarize briefly the three opinions of the division of the court which heard this case. Each found it necessary to speak separately. Judge McGowan felt that the lower court did not have the power to apportion taxes assessed or disturb their imposition. He did not believe it necessary to determine whether or not under District of Columbia law a lien had arisen, even though other Federal Courts which examined this question found this point to be critical. Chief Judge Bazelon joined in Judge McGowan's decision for reasons stated separately by him. As to the question of whether or not a property owner should be required to pay tax for the period beyond which he holds the property, he stated "We all agree that fairness requires that the original owner of the condemned property pay real property tax only for that part of the year in which he had effective use of the property." He found the essential question to be between the Federal

and District Governments only as to who should bear the burden or loss for the remaining period of the year. Appellees can only say to both judges of the majority: What about us? Appellees feel lost in the legal shuffle.

Both Judge McGowan and Chief Judge Bazelon expressed concern for the District of Columbia's need to be able to estimate its tax revenues and the dislocation caused the District by the removal of property from the tax rolls after the commencement of the tax year. If there had been any planning on the part of D.C. budget officials with respect to this particular revenue, it would undoubtedly have been on the basis of a complete tax exemption prior to July 1. Not only had the taking been widely announced in advance but it actually commenced in June and more than half of the properties were already taken by and off the tax rolls by July 1. For those properties there was no tax payable at all. Certainly budget officials could not have anticipated how many of the properties would have been lost to them for the whole year and how many for part year when the whole process depended on the speed or slowness of the Federal action.

Judge Washington disagreed with both judges of the majority and would have upheld the opinion of the lower court. He felt that it was within the power of the court to enter a "just and equitable" order apportioning the taxes, pointing out with respect to the code provision containing this phrase that "insofar as realty taxes go, the provision could have little other function." He faced the issue of whether or not a lien had attached and expressed the opinion that one had not arisen.

Thus we find three separate opinions based on three separate reasons. This would appear to be a classic case for rehearing en banc.

IV

**The Decision Decides a Point of Far Reaching
Significance to the United States, the District
of Columbia, and Property Owners Generally,
the Importance of Which Warrants a Rehearing
En Banc.**

The decision of the Court, ironically enough, will be of great benefit to other property owners whose property is taken in condemnation even though it reverses the lower court's holding in appellees' favor. This is because owners in future cases can now claim tax assessments as damages whereas this right was not known to appellees when they settled with the Federal Government. The United States has recognized the importance of this far reaching holding and has filed its own petition for rehearing en banc. Appellees' reasoning in requesting a rehearing is, of course different from that of the United States but the fact that the U. S. desires a rehearing, even though it may not be affected in this particular case shows the importance of the point. It should be added, as appellee pointed out in oral argument, that there are a great many other property owners whose tax liability is affected by the present decision. In order to avoid a multiplicity of suits, it had been informally stipulated between many of the remaining owners of property in the FBI building area and the District of Columbia that their tax liability would be determined by this appeal. Many thousands of dollars in taxes is involved in this case and those which depend upon it. The amounts which will be involved in future cases can hardly be estimated.

V

If the Court Adheres to Its Decision, It Should Amend Its Remand to the Lower Court So as to Expressly Permit Further Proceedings Between Appellees and the United States for the Purpose of Compensating Appellees for Taxes.

The decision of the majority is not clear on the question of whether or not appellees may still pursue their claim for taxes against the Federal Government.

Although their claims have been settled with respect to other items of damages, the question of tax indemnification was never considered in settlement. Appellees should be expressly permitted to reopen their claims on this point only and the lower court should be so instructed. Appellees assert this on the following grounds:

A. The case has not been finally closed. Money is being held in escrow and an order of distribution must eventually be entered on the basis of the decision in this appeal. Although the dispute was between the District Government and appellees, the Federal Government recognized its own involvement to the extent of seeking and obtaining leave to file a memorandum stating its opinion and a later petition for rehearing. Thus, all parties are before the Court.

B. Settlement with the U. S. Government was made without any consideration by either party on the subject of unpaid taxes. To permit appellees to reopen their claims now so as to claim such compensation will not cause the Government to pay any more for these properties than they would have paid if the parties in settlement had considered taxes were a compensable item.

C. Settlement was made by both parties on the basis of a mutual mistake of law. Appellees were guided toward their mistaken belief by the Government itself. Department of Justice attorneys consistently

assured the property owners that under no circumstances would the amount of taxes be considered in settling claims. Although the Federal Government has not spoken on this point, in all equity it should join appellees in this prayer. Surely the United States Government cannot be heard to say to its citizens: "Although our mutual mistake as to the law and your understandable reliance on your government's assurances placed you in the position you are now in, we will not help in extricating you." Fairness dictates a different result.

VI

CONCLUSION

It is submitted that, for the reasons stated above, the Court is urged to grant this Petition for Rehearing and to grant the Rehearing En Banc.

Respectfully submitted,

HENRY H. BRYLAWSKI
224 East Capitol Street
Washington, D.C.
Attorney for Appellees

CERTIFICATE

I certify that this Petition of Appellees for Rehearing and for Rehearing En Banc is filed in good faith and not for purposes of delay.

Henry H. Brylawski
Attorney for Appellees

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,275

DISTRICT OF COLUMBIA,

Appellant

v.

SAMUEL SUSSMAN, ET AL.,

Appellees

No. 18,276

DISTRICT OF COLUMBIA,

Appellant

v.

ARTHUR INVESTMENT CO., INC., ET AL.,

Appellees

ANSWER TO PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING

Inasmuch as appellees have by means of this petition asked for a rehearing themselves, they have in effect joined the United States in its petition for rehearing although for different reasons. Accordingly, appellees would request that the petition of the United States for rehearing be granted.

Respectfully submitted,

HENRY H. BRYLAWSKI

224 East Capitol Street
Washington, D. C.

Attorney for Appellees

CERTIFICATE OF SERVICE

I certify that the foregoing Petition and Answer have been served by mail on Corporation Counsel for the District of Columbia and Roger Q. Marquis, Attorney, Department of Justice, this ____ day of August, 1965.

Henry H. Brylawski
Attorney for Appellees

PETITION OF THE UNITED STATES FOR REHEARING
AND SUGGESTION THAT REHEARING BE HAD EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPEALS FROM THE UNITED STATES DISTRICT COURT
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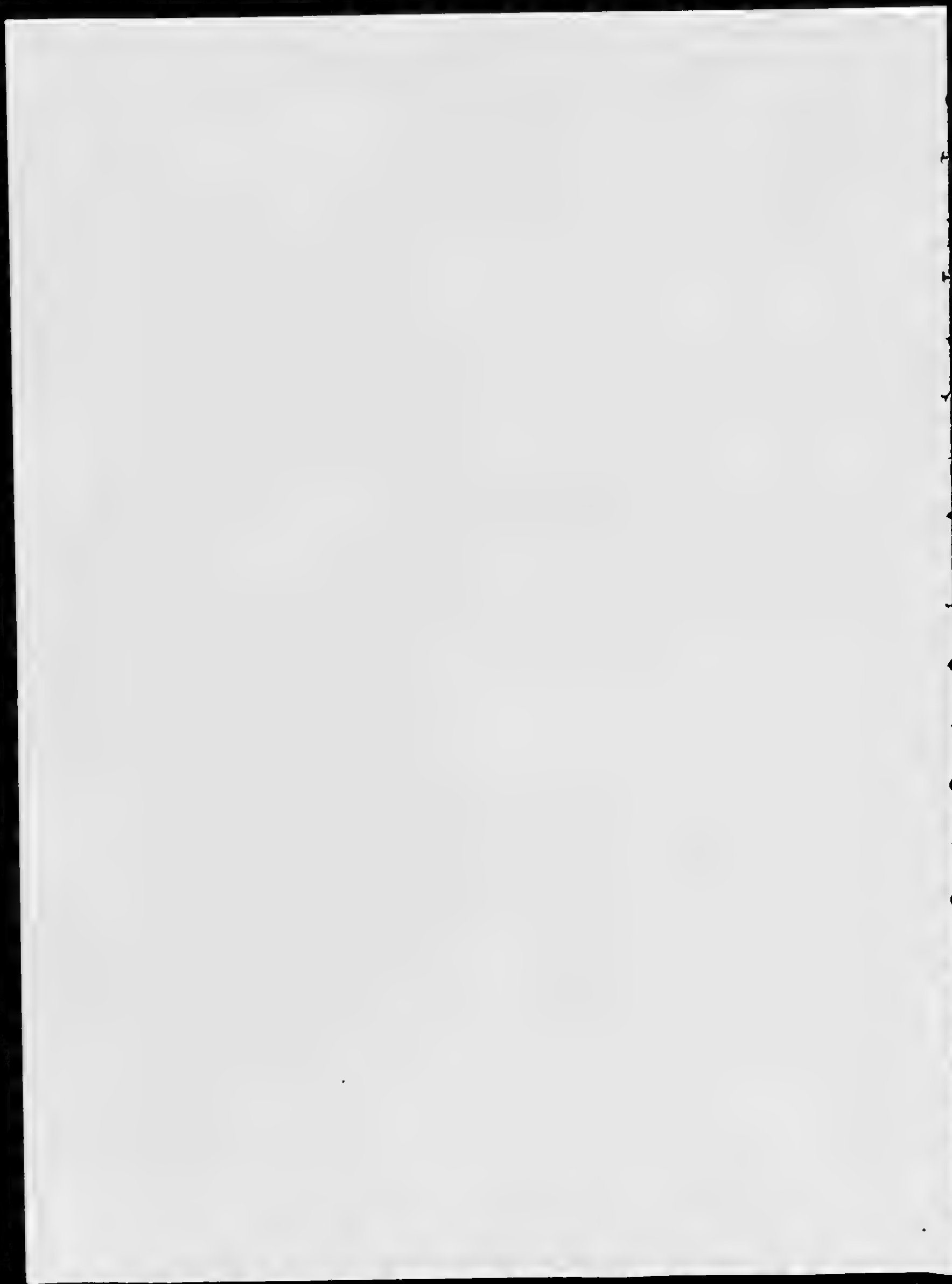
United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 9 1965

Nathan J. Paulson
CLERK

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C. 20530.



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*/ Cases chiefly relied upon are marked with an asterisk.

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*/ Cases chiefly relied upon are marked with an asterisk.

UNITED STATES COURT OF APPEALS
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ARTHUR INVESTMENT CO., INC., ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION OF THE UNITED STATES FOR REHEARING
AND SUGGESTION THAT REHEARING BE HAD EN BANC

The United States of America, by its undersigned
attorneys, presents this petition for rehearing and requests
that such hearing be had en banc and in support thereof re-
spectfully shows:

I

TO THE SURPRISE OF COUNSEL FOR THE UNITED STATES AND CONTRARY TO ALL PRECEDENT IN FEDERAL CONDEMNATION CASES THE DECISION WOULD EMBROIL THE UNITED STATES IN CONTROVERSIES TO WHICH IT HAS HERETOFORE NOT EVEN BEEN A PROPER PARTY

1. It is generally improper for the United States to take sides between distributees when condemnation funds on deposit are distributed. - United States v. Dunnington, 146 U.S. 338 (1892), relating to a condemnation in the District of Columbia, is the leading case for the propositions that condemnation is a proceeding in rem; that the condemnor's obligation (in a fee taking) is to pay the value representative of "the whole fee, and the interests, both present and prospective, of every person concerned in the property, * * *" (Id. p. 351). When it paid this amount into court "It had discharged its entire liability by the payment into the court, and was not entitled to notice even of the order for the distribution of the money" (p. 352). This basic principle has been followed by federal condemnation courts for the ensuing 73 years without qualification in so many cases and in such a myriad of diverse problems of distribution,

including tax claims, that it seems unnecessary to multiply citations. Neither the opinion of Judge McGowan or Chief Judge Bazelon^{1/} suggests any reason in the instant case for departure from this basic tenet nor whether the departure is to be confined to tax liens. Heretofore the rule has applied to other liens, such as mortgages, as well as tax liens.

2. The United States should be heard when its rights have been adjudicated in proceedings of which it was not entitled to receive notice. - Since under Dunnington the United States was not a proper party to this distribution dispute, it merely filed a short memorandum so stating. And since neither party challenged this fact nor argued that liability of the United States should be increased beyond fair market value because of taxes, it did not appear at the argument. Under applications of the Dunnington rule, the United States has been criticized even when it appeared as amicus curiae when one of the parties could not be represented. United States v. Lands

^{1/} Since it is not clear to what extent there may be said to be a majority ruling on law here, we will so designate the opinions.

in Hempstead, Nassau Cy, N.Y., 129 F.2d 918, 919-920 (C.A. 2, 1942), answering the Government's statements as amicus curiae, said "it may be answered, first, that the condemnor, having paid into court just compensation for the land, has performed its full duty and is not concerned as to whom or when the court distributes it; the condemnor is not even entitled to notice of the order of distribution." See also City of St. Paul v. Certain Lands in City of St. Paul, Minn., 48 F.2d 805, 807 (C.A. 8, 1931): "The government is not interested in the question of the proper distribution or apportionment of this award. Its duty will have been performed when it pays the amount of the award into court."

The result of this Court's decision is or may be to increase the Government's liability beyond fair market value. The United States should, we submit, be given an opportunity to be heard on rehearing before that is done, since "it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it." Searl v. School District, Lake County, 133 U.S. 553, 562 (1890).

II

THE JUDGMENT WOULD APPARENTLY COMPEL THE
UNITED STATES TO PAY MORE THAN JUST
COMPENSATION AS REQUIRED BY THE FIFTH AMENDMENT

The standard of just compensation under the Fifth Amendment is fair market value. Riley v. District of Columbia Redevelop. Land Agency, 100 U.S.App.D.C. 360, 246 F.2d 641 (1957). This Court apparently holds, however, that the "portion of the tax allocable to the period after the taking is a provable element of damage" (p. 12 of slip opinion). But in United States v. 150.29 Acres in Milwaukee County, Wisconsin, 135 F.2d 878 (C.A. 7, 1943), the court said (p. 880): "The United States had paid the fair cash market value for that property. That is all the value the property could have. It acquired a title free from all liens or claims whatsoever. [Citation.] The fair cash market value paid into court took the place of the property, and liens, if any, attached to the fund. [Citations.] We think it clear therefore that the United States was not liable, nor was the property after it had been taken." (Emphasis supplied.)

This is a statement of the uniform federal law. This Court states no basis upon which it may be concluded that the Fifth Amendment, or any statute, imposes a greater liability on the United States in the District of Columbia.

On a similar view, the opinion of Chief Judge Bazelon says the question is whether the tax for the remainder of the year "may be imposed on the Federal Government as part of its condemnation cost" (slip opinion, p. 12) and answers the question yes. The settled federal law is to the contrary. Condemnation courts lack jurisdiction to impose costs upon the United States of any nature. Carlisle v. Cooper, 64 Fed. 472 (C.A. 2, 1894); United States v. 1,000 Acres of Land in Plaquemines Parish, La., 162 F.Supp. 219, 224 (E.D. La.), aff'd on other grounds sub nom. Police Jury of Plaquemines Parish v. United States, 272 F.2d 827 (C.A. 5, 1960), cert. den., 362 U.S. 941; United States v. 251.81 Acres of Land in Meade County, Ky., 50 F.Supp. 81 (W.D. Ky. 1943); United States v. Certain Lands in Towns of Woodbury and Highlands, 61 F.Supp. 383 (S.D. N.Y. 1945).

Three obvious answers may be made to the theorizing of Judge McGowan (p. 8, slip opinion) that, in a private sale, apportionment of taxes is part of the bargaining of price and that, when the United States negotiates, "the owners * * * prior to its flexing of the muscle of condemnation, would have been able to insist upon the same approach." First, it is not true that current taxes are a part of bargaining in most sales of real property. The sale price is reached and then, at settlement, taxes are merely one of the items which are adjusted. Other items include such matters as prepaid insurance or utilities, supplies available, such as fuel oil, or special personal property which vendor may wish to include. To our knowledge, no authority suggests that matters such as this would have any bearing on market price, for example, of a comparable sale. Cf. District of Columbia Redevelop. L.A. v. 61 Parcels of Land, 98 U.S.App.D.C. 367, 235 F.2d 864 (1956).

Second, transactions with the Government are different from the supposed transaction since the moment title passes, the property becomes tax exempt.

Third, government agents would have been compelled to reject any such argument of landowners. They are not authorized to pay by purchase on a different basis than would be the case in condemnation. Otherwise, in protection of the Government's interests, they would have to throw every case into condemnation. Thus, the standard is the same, whatever the mode of acquisition. United States v. Dow, 357 U.S. 17 (1957). Since this tax claim does not relate to fair market value, it would, we submit, be plain error to submit to the jury any evidence concerning it. Thus, in Westchester County Park Commission v. United States, 143 F.2d 688 (C.A. 2, 1944), cert. den., 323 U.S. 726, the fact that the property, after acquisition, was tax exempt in the hands of the United States was held to be immaterial, since the exemption was not acquired in the condemnation proceedings. To allow tax liability for the remainder of the year to inflate the award is simply an indirect way of achieving the same result. Westchester County is, therefore, in conflict with the present decision.

III

A PARTIAL WAIVER OF FEDERAL IMMUNITY FROM
TAXATION AUTHORIZING AN ADDITIONAL AWARD
IN CONDEMNATION PROCEEDINGS IS UNWARRANTED

There are, we believe, several answers to the "implied waiver of immunity" theory of Chief Judge Bazelon. First, there is no justification for implying a waiver in the face of the plain, unambiguous provision of District of Columbia Code, Title 47-801a(*), excepting "Property belonging to the United States of America." Second, while the exemption is said to be found in the tax statutes, it is applied apparently only to condemnation cases. There is not the remotest indication in the Declaration of Taking Act or other condemnation statutes justifying this. Third, it attributes to Congress an irrational distinction between mode of acquisition. Fourth, when Congress has waived the immunity, it has done so in express terms with a clear statement of the limitation of the waiver, e.g., D.C. Code, Title 5, Sec. 712. Fifth, the conclusion erroneously assumes that funds appropriated for payments of acquisition of property may be diverted to the payment of local taxes. There is nothing to suggest that such appropriation was made for this purpose.

IV

REHEARING SHOULD BE HAD BEFORE
THE FULL BENCH OF THIS COURT

The question arises in every federal condemnation case in the District of Columbia. There are three divergent opinions. Although the opinion of Chief Judge Bazelon states that he joins in Judge McGowan's opinion, the logic of its reasoning would produce a different result, i.e., direct payment of the taxes by some unstated federal authority from that directed by Judge McGowan, i.e., submission of some question to a jury. It is not clear what issue and what evidence would go to the jury. Whatever it is, this would impede the prompt disposition of the only issue which should go to the jury - market value of the property - to the prejudice of landowners as well as the United States.

Since it is a complete departure in the respects noted from settled federal condemnation law, the decision will produce much argument and confusion, especially as to its scope. Thus, the theory of Judge McGowan would equally apply in all the 50 states and in logic there is no reason to limit it to regular

real estate assessments rather than other liens. Indeed, in view of the suggestion (fn 7, p. 11, slip opinion) that the existence of a lien is not controlling, the basic principle that the United States only pays for claims that have become a lien on the land taken, Mullen Benevolent Corp. v. United States, 290 U.S. 89, 95 (1933), is thrown in question.

Moreover, as we have noted, the result of the decision is to inject the United States into controversies which heretofore have been none of its business. Confusion is added to the case. The United States must throw its weight on the side of one party or another to the prejudice of the other. And this is an area where the problems are by no means simple. Cf. 150.29 Acres, supra, where the federal court held the case as to that issue in abeyance until the state court should decide the tax question.

CONCLUSION

It is submitted that, for the reasons given, this petition should be granted, and it is suggested that it should be heard by the full bench of this Court.

Respectfully submitted,

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CERTIFICATE

I certify that this Petition of the United States for Rehearing and Suggestion that Rehearing be had En Banc is filed in good faith and not for purposes of delay.

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